Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

JOHN DOE, ET. AL.,
Petitioners,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT ET. AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do school children, subjected to sexual abuse by their teacher, "protected" by Title IX, enjoy this Court's *Reeves* summary judgment standard, particularly when DISD (not the school principal herself) asserts an affirmative defense that the principal tragically did not recognize the risk to her students?

2. Do school children, subjected to sexual abuse by their teacher, "protected" by Title IX, have the same test for deliberate indifference as prisoners under this Court's *Farmer* decision?

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are Mrs. Doe, on behalf of John Doe, on behalf of Jack Doe on behalf of James Doe, John Doe, Joe Doe, Mrs. Roe as next friend of Jack Roe and Ms. Smith as next friend of James Smith. To Petitioner's knowledge Dallas Independent School District has no parent companies or wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Mrs. Doe, on behalf of John Doe, on behalf of Jack Doe on behalf of James Doe, John Doe, Joe Doe, Mrs. Roe as next friend of Jack Roe and Ms. Smith as next friend of James Smith pray for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on July 24, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 220 F.3d 380 (5th Cir. 2000), and a copy is contained in the Appendix attached hereto. A copy of the memorandum order of the United States District Court for the Northern Division of Texas is contained in the Appendix attached hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on July 24, 2000. Pursuant to this Court's Rule 13.1, this petition for writ of certiorari is timely because it is being filed within ninety days after entry of judgment.

STATUTE INVOLVED

Relevant portions of Title IX are set forth below.

20 U.S.C. § 1681 (a)

Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This case is based on the sexual abuse of young boys by their male teacher, an employee of the Dallas Independent School District. This case was filed in state court by or on behalf of Plaintiffs John Doe, Joe Doe, Jack Doe and James Doe, on August 20, 1993 and was removed to federal court on September 22, 1993. On December 20, 1993 defendants filed their Motion to Dismiss Plaintiffs' Section 1983 allegations. The trial court denied this motion by Order dated March 29, 1995, but on its own motion dismissed the plaintiffs' Title IX claims, finding that the statute did not apply to the sexual abuse of boys by a male school employee. Plaintiffs Bob Black, Bill Black, William White and George Green subsequently filed complaints that were consolidated with this action by order dated February 20, 1996. Defendants thereafter filed a Motion for Summary Judgment on plaintiffs' Section 1983 claims, which the trial court granted by Memorandum Order on October 29, 1996. The parties filed a Joint Motion to Enter Interlocutory Order and for Stay Pending Appeal which was immediately granted by the trial court. The Fifth Circuit denied the petition for Interlocutory Appeal on February 20, 1997. On March 4, 1997, Plaintiffs filed their Motion to Dismiss with Prejudice all claims against Defendant John Earl McGrew. The Trial Court dismissed all claims against defendants DISD, Patrick

and McGrew and granted Final Judgment on March 6, 1997. Plaintiffs filed their timely Notice of Appeal on April 1, 1997.

On August 27, 1998, the Fifth Circuit affirmed the district court's grant of summary judgment for defendants on the Section 1983 claims, reversed its dismissal of the Title IX claim and remanded the case to the district court for further proceedings consistent with its opinion. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211 (5th Cir. 1998). On September 30, 1998, Defendant DISD (now the only defendant) filed its Motion for Summary Judgment. On April 20, 1999, the district court entered its Memorandum Order that granted summary judgment on all remaining claims in the case and its judgment consistent therewith. Plaintiffs appealed the district court's order to the United States Court of Appeals for the Fifth Circuit, and following oral argument, a three-judge panel affirmed the judgment of the district court.

The district court had jurisdiction over the boys' claims under 28 U.S.C. §§ 1331 and 1343.

B. Factual Background

Between 1983 and 1987 Plaintiffs were sexually molested by John Earl McGrew (McGrew) who was a teacher and Boy Scout leader at J.J. Rhoades Elementary School. Barbara Patrick (Patrick) was the principal at J.J. Rhoades during this time period and was invested by the school board with the duty to supervise McGrew and the power to take actions that would end sexual abuse. In her capacity as principal, Patrick was the instructional leader of her school and responsible for discipline at the campus. Patrick was also responsible

for recommending personnel actions and was expressly authorized to recommend the assignment, evaluation, promotion, and dismissal of teachers. In addition to making these referrals, Patrick was required to maintain records documenting these decisions.

Although at least two children told Patrick that McGrew had sexually fondled them, Patrick made no such referral in McGrew's case. Patrick was supposed to receive and keep a copy of the "report of suspected child abuse" form. Patrick did hold a conference with the mother of student J.H.[1], and McGrew after the mother reported that J.H. had been fondled by McGrew. Patrick handled this meeting as a mere formality. Initially, Patrick tried to discourage the mother from pursuing the allegation by telling the mother that McGrew was an exemplary faculty member. Patrick continued to pressure the mother to drop the issue by telling the distraught parent that the child was lying and making it difficult to arrange a conference with McGrew. Furthermore, prior to the meeting Patrick told McGrew that she knew he had not done what he was accused of, but that the meeting was required. During the conference both the mother and J.H. confronted McGrew while Patrick remained supportive of him. McGrew did not deny the allegation at the meeting. Patrick even went as far as to force J.H., the victimized student, to meet one on one with McGrew. After the conference Patrick merely told McGrew that the school did not tolerate the type of behavior of which he had been

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[1] Although Plaintiffs used pseudonyms as party names in this litigation, depositions were taken using the initials of their proper names. Furthermore, as some Plaintiffs have reached the age of majority during this litigation, they have used their proper names in sworn testimony.

accused. However, no investigation or monitoring followed this "warning" or the conference. Patrick testified that she did not refer the matter because she was not sure it was true. Never does Patrick contend that she knew the allegation was unfounded. Subsequently, McGrew was arrested and convicted of sexually abusing children.

In preparation for the criminal and civil litigation that resulted from these horrible incidents some of the Plaintiffs have been required to give testimony on several occasions. For instance, in 1988, D.D.P swore in an affidavit that McGrew pinched him in his privates around Thanksgiving of 1984 and that he told Patrick of the incident. When deposed in 1996, D.D.P., who had spent over a decade trying to repress the horrors that accompany sexual abuse, did not testify that he reported the abuse to Patrick. At the time he was questioned in 1996, D.D.P. was not allowed to refresh his recollection with his 1988 affidavit or informed that his deposition testimony differed from his previous recounting of the events. In 1999, D.D.P. swore to an affidavit in an effort to clarify the disparity between his prior testimonies. D.D.P.'s 1999 affidavit explains that his 1988 affidavit serves as a more accurate representation of the events that occurred in 1984. D.D.P. also explains the tremendous emotional toll the molestation took on him and how he coped by repressing the details surrounding the encounters.

REASONS FOR GRANTING THE WRIT

There are two reasons for granting this Petition for Writ of Certiorari. First, the Fifth Circuit's decision conflicts with this Court's explicit requirements for determining summary judgment as explained last term

in *Reeves v. Sanderson Plumbing Prods., Inc.*, ____ U.S.____, 120 S.Ct. 2097 (2000). Second, the Fifth Circuit's decision conflicts with the standard set by this Court for evaluating whether the requirements for deliberate indifference have been met in *Farmer v. Brennan,* 511 U.S. 825 (1994). The importance of these issues and the tremendous departures taken by the Fifth Circuit from the precedent set by this Court dictate granting Plaintiff's Petition for Writ of Certiorari.

A. Conflict with *Reeves v. Sanderson Plumbing Prods., Inc.*

The Fifth Circuit undertook fact-finding that conflicts with this Court's recent decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, ____ U.S.____, 120 S.Ct. 2097 (2000). In *Reeves,* this Court articulated a clear standard for courts to apply to the evidence that they consider when deciding both motions for judgment as a matter of law and summary judgment. *Id.* at 2110. Explicitly, this Court instructs that "... although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. ... That is, the court should give credence to the evidence favoring the nonmovant as well as that "'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.'" *Id.* This petition for writ of certiorari should be granted because the Fifth Circuit failed to follow this Court's standard when it considered DISD's motion for summary judgment.

In *Reeves,* this Court found that the respondent was not entitled to judgment as a matter of law because, in

addition to proving a prima facie case of discrimination and creating a jury issue as to the respondent's explanation of the incident, the petitioner introduced evidence that the respondent was motivated by age-biased animus. *Id.* In this case petitioners produced evidence of notice and deliberate indifference on the part of Patrick. Specifically, Plaintiffs produced evidence that Patrick chose not to investigate allegations about McGrew. At least two school children informed Patrick that they had been touched inappropriately by McGrew. In addition to trying to discourage a mother from pursuing her child's complaints, Patrick reassured McGrew that she was confident of his innocence. Furthermore, she forced J.H. to have a one on one interaction with McGrew. Even when McGrew failed to deny the allegation, Patrick did not investigate further or implement any type of monitoring system. Patrick has never contended that she knew the allegation was unfounded. For the Fifth Circuit to have ignored this evidence without letting a jury consider it is a significant departure from this Court's standard.

Further, the Fifth Circuit disregarded a 1999 affidavit and concluded that petitioners' evidence failed to create a genuine issue of material fact as to Patrick's deliberate indifference. *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 383 (5th Cir. 2000 ("*Doe II*")). In applying the *Reeves* standard for summary judgment evidence, the decision to evaluate the credibility of the affidavit was completely erroneous. Primarily, the standard requires credence be given to the nonmoving party. Thus, statements presented by the petitioner must be taken to be true. Questions regarding credibility of the affiants or the affidavits themselves cannot be resolved through summary judgment. Rather, a movant has

opportunity to make these reservations known to a jury. For the Fifth Circuit to have considered the credibility of the evidence was a tremendous departure from the acceptable standard articulated by this Court.

Credibility determinations are in the province of the jury. The court is not permitted to weigh evidence or make credibility determinations. *Reeves* at 2110. The Fifth Circuit acted in clear violation of this principle. The appellate court most certainly undertook a credibility analysis and accordingly entered the domain of the jury in clear violation of this Court's position in both *Reeves* and *Anderson v. Liberty Lobby*. *Id.; Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). This petition for writ of certiorari should be granted on the grounds that the Fifth Circuit usurped the drawing of reasonable inferences, the determination of credibility, and the weighing of evidence from a jury.

Additionally, the Fifth Circuit was incorrect in undertaking a fact finding analysis to determine the evidentiary effect of the 1999 affidavit. In its opinion, the Fifth Circuit went into excruciating detail as it analyzed the information D.D.P. gave in his 1988 affidavit, 1996 deposition and 1999 affidavit. *Doe II* at 384-87. The court goes to great lengths to identify the discrepancies among the three sworn testimonies. *Id.* After conducting such an extensive study of D.D.P.'s testimony, the Fifth Circuit concludes that the 1999 affidavit was made in an effort to create a genuine issue of material fact and therefore cannot be considered. *Id.* at 386. The fact that the court pursued any sort of evidentiary analysis of D.D.P.'s testimony is unacceptable judicial activism. Rather, the jury should have had the opportunity to decide whether it believed the deposition testimony or the 1999 affidavit.

The Fifth Circuit did not give proper consideration to Plaintiff's argument that the policy underlying F.R.E. 803(5) and allowing for recorded recollections to be considered hearsay exceptions should be extended to this situation. Succinctly, 803(5) allows the jury to hear the contents of a record when the witness lacks sufficient recollection to testify fully and accurately at the time of trial. 803 (5) allows witnesses to testify that a document was created when they were more certain of the details. Thus, D.D.P.'s 1999 affidavit including its explanation should be given the same accord. A jury ought to be able to determine which components of D.D.P's testimony are most convincing. Thus, for the court to resolve this issue at the summary judgment stage was inappropriate. This petition for certiorari should be granted because a jury was denied the opportunity to weigh evidence and make a determination on the credibility of the various forms of D.D.P.'s testimony.

Finally, the Fifth Circuit misinterprets this Court's caveat regarding consideration of the moving party's evidence. Specifically, this Court explains that a court may give credence to the "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses." *Reeves* at 2110. Thus, the Fifth Circuit's consideration of Patrick's testimony is erroneous because it is neither uncontradicted nor from a disinterested witness. Plaintiffs have presented ample testimony, including affidavits from molester McGrew and school children subjected to his perverse activity, challenging Patrick's recounting of the events. Furthermore, Patrick cannot be considered a disinterested witness when her very own actions are being evaluated

to determine if she was sufficiently aware of the risk McGrew posed to her students to constitute deliberate indifference. For these reasons, the Fifth Circuit misapplied this Court's standard for evaluating the moving party's evidence in making a summary judgment determination. Accordingly, granting the Plaintiff's petition for writ of certiorari is appropriate.

B. Conflict with *Farmer v. Brennan*

The Fifth Circuit decision conflicts with this Court's decision in *Farmer v. Brennan,* 511 U.S. 825 (1994) in finding that Patrick did not act with deliberate indifference. Despite its relevance, the Fifth Circuit opinion completely disregarded *Farmer.* In *Farmer*, this Court held that the determinative factor for finding deliberate indifference is whether or not the official recognized the risk. *Id.* at 836. In that case, the issue was whether placing a transsexual with feminine characteristics into the general population of a prison population that was known to be violent would constitute deliberate indifference under the Eighth Amendment. *Id.* at 835. This Court ruled that this determination should not be made on summary judgment and remanded.

Doe II presents the same question in the context of sexual abuse of school children by a teacher. The Fifth Circuit "found" facts, without evidence, and contrary to *Reeves*. It found that Patrick did not act with deliberate indifference. Basing its decision on the view that Patrick's ineffective actions ought not be tantamount to deliberate indifference, the appellate court failed to focus on whether Patrick had knowledge of the risk. The Fifth Circuit opinion claims that it drew all reasonable inferences in favor of the Plaintiffs on the issue of deliberate indifference and was still unable to find a

question of material fact. Such a finding is not possible under *Farmer* and *Reeves* in light of the evidence presented. According to Patrick's own testimony, she interviewed J.H., spoke with his mother, held a conference and warned McGrew that he would be dealt with if the allegations were founded. Patrick, an interested party, never testified she concluded that there was no risk or that McGrew had not in fact engaged in sexual abuse. This conduct clearly indicates that Patrick was cognizant of the risk that at hand. The Fifth Circuit glossed over this evidence to find that Patrick made a tragic mistake. While a tragic mistake might be one conclusion a jury could reach, it is not the sole possible or even likely conclusion. Because there is evidence that Patrick herself, per her own testimony, recognized the risk, summary judgment could not stand under *Farmer*.

In *Farmer* this Court required courts to treat a failure to act as deliberate indifference, which is "a state of mind more blameworthy than negligence" and "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* at 1977-78. It went further to explain that deliberate difference lies between negligence and purpose or knowledge and cited that "the Courts of Appeal have routinely equated deliberate indifference with recklessness." *Id.* at 1982-83. Based on the factual record developed in this case, it is clear that there is a jury question about whether Patrick acted recklessly in how she chose to handle the allegations against McGrew.

Furthermore, the Fifth Circuit decision conflicts with *Farmer*, which held that deliberate indifference is an affirmative defense. *Id.* at 1982-83. As an affirmative defense, DISD bears the burden of proving that Patrick did not act with deliberate indifference. Thus, the mere

mention that "Plaintiffs have failed to create a genuine issue of material fact" is procedurally flawed. *Doe II* at 388. Plaintiffs should be under no obligation to prove how Patrick did not act. Rather, for Patrick to protect herself from liability via the affirmative defense of deliberate indifference, she was obligated to prove that her actions were reasonable. Just as this Court held in *Farmer,* the presentation of facts should be made to a jury where fact-finders will have the opportunity to determine Patrick's state of mind.

Because the Fifth Circuit failed to apply *Farmer* and require DISD to prove to the jury that Patrick was unaware of the known risk to McGrew's students, this petition for writ of certiorari should be granted.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

220F.3d 380
146 Ed. Law Rep 80
(Cite as: 220 F.3d 380)

United States Court of Appeals,
Fifth Circuit.

No. 99-10612.

DOE, Mrs., on behalf of John Doe, on behalf of Jack Doe, on behalf of James Doe; et al.,
Plaintiffs,

John Doe; Joe Doe; Ms. Roe, as next friend of Jack Roe; Ms. Smith, as next friend of James Smith,
Plaintiffs-Appellants,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, et al.,
Defendant,

Dallas Independent School District,
Defendant-Appellee.

July 24, 2000.

State court action was brought against school district and principal on behalf of minor students who were allegedly sexually molested by teacher. After removal, the United States District Court for the Northern District of Texas, A. Joe Fish, J., dismissed Title IX claim and granted summary judgment for defendants on § 1983 claim. Students appealed. The Court of Appeals, 153 F.3d 211, affirmed in part, reversed in part, and remanded for consideration of the Title IX claim. On

remand, the District Court granted summary judgment in favor of the defendants on the Title IX claim, and students appealed. The Court of Appeals, King, Circuit Judge, held that principal's response to allegation that male teacher sexually molested male student did not amounted to deliberate indifference, and therefore school district could not be held liable under Title IX for further alleged acts of sexual harassment of students.

Affirmed.

West Headnotes

[1] Civil Rights k200

78k200

Title IX is enforceable through an implied private right of action. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[2] Civil Rights k128

78k128

School district officials may avoid Title IX liability for a teacher's sexual harassment of a student under a deliberate indifference standard by responding reasonably to a risk of harm, even if the harm ultimately was not averted. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[3] Civil Rights k127.1

78k127.1

Determining what constitutes appropriate remedial action for allegations of discrimination in Title IX cases

necessarily depends on the particular facts of the case. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

[4] Federal Civil Procedure k2539

170Ak2539

Nonmoving party could not manufacture a genuine issue of material fact to defeat a motion for summary judgment by submitting an affidavit that impeached prior testimony without explanation.

[5] Civil Rights k128

78k128

School principal's response to allegation that male teacher sexually molested male student did not amounted to deliberate indifference, and therefore school district could not be held liable under Title IX for further alleged acts of sexual harassment of students; principal interviewed student and his mother, spoke with teacher and warned him either that he would be "dealt with" if the accusations were founded or that he should avoid acting in a way that could be misconstrued, and although she erroneously concluded that student's allegation was not true, her actions, though ineffective in preventing teacher from sexually abusing students, were an inadequate response to student's allegation. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

***381** Hal K. Gillespie (argued), Gillespie, Rozen & Watsky, Dallas, TX, for Plaintiffs-Appellants.

Dennis J. Eichelbaum (argued), Schwartz & Eichelbaum, Plano, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, Chief Judge, and GARWOOD and DeMOSS, Circuit Judges.

KING, Chief Judge:

Plaintiffs-Appellants appeal the district court's grant of summary judgment in favor of Defendant-Appellee Dallas Independent School District on their claims brought under Title IX of the Education Amendments of 1972. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

John Earl McGrew, a third-grade teacher and Boy Scout troop leader at Joseph J. Rhoades Elementary School ("J.J. Rhoades"), sexually molested numerous male students between 1983 and 1987. He was subsequently convicted in state court on one count of aggravated sexual assault and two counts of indecency with a child. McGrew was sentenced to one life sentence and two twenty-year sentences.

After McGrew's criminal conviction, a number of his victims brought this action against the Dallas Independent School District ("DISD"), John Earl McGrew, the Boy Scouts of America, Circle Ten Council, Inc. Boy Scouts of America, J.J. Rhoades, Linus Wright, Marvin Edwards, and Barbara Patrick.[1] Mrs. Doe on behalf of

[1]J.J. Rhoades was not named as a defendant as of Plaintiffs' First Amended Complaint, filed on March 2, 1994. Plaintiffs stipulated to the dismissal with prejudice of Marvin Edwards and Linus Wright as defendants on July 26, 1996. Plaintiffs entered into an agreed order dismissing with prejudice all claims against the Boy Scouts of America and Circle Ten Council, Inc. Boy Scouts of America on October 11, 1996.

John Doe, Joe Doe, Jack Doe, and James Doe[2] originally filed the case in state court. The case was subsequently removed to the United States District Court for the Northern District of Texas. The complaint alleged claims under 42 U.S.C. § 1983, Title IX of the Education Amendments of 1972, see 20 U.S.C. § 1681, and Texas tort law. The plaintiffs in this action later amended their complaint to add a claim under the Constitution of the state of Texas.

The district court dismissed the plaintiffs' Title IX claim because it concluded that same-sex sexual harassment was not actionable under Title IX. The district court also dismissed the plaintiffs' claims brought under Texas tort law and claims for damages under the Texas Constitution, leaving only the § 1983 claim intact. On November 24, 1995, a second lawsuit was filed in federal district court by other minor ***382** victims of McGrew. This second lawsuit, brought by or on behalf of Plaintiffs-Appellants Bob Black, Bill Black, William White, and George Green, alleged the same facts and asserted identical claims as that brought by the Does, Ms. Roe, and Ms. Smith. On February 20, 1996, it was consolidated with the first-filed action.[3]

On July 30, 1996, defendants DISD and Barbara Patrick, who was the principal of J.J. Rhoades at the time of the alleged abuse (collectively, "Defendants"), filed a motion for summary judgment on Plaintiffs'

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[2]The names of the minor victims were changed to protect their identities for the purposes of filing this action. The initials of the boys' actual names are used to identify them in depositions and affidavits.

[3]We will refer collectively to the plaintiffs from both lawsuits as "Plaintiffs."

remaining § 1983 claims, arguing that (1) no grounds existed upon which DISD could be held liable for McGrew's misconduct, and (2) Patrick was entitled to qualified immunity. On October 29, 1996, the district court granted summary judgment in favor of Defendants on all of Plaintiffs' § 1983 claims. The court entered a final judgment on all claims in favor of Defendants on March 5, 1997. Plaintiffs timely appealed to this court.

We affirmed the district court's grant of summary judgment. See *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211 (5th Cir.1998) ("Doe I "). This court held that DISD neither delegated to school principals the authority to create policies to address allegations of sexual abuse nor acted with deliberate indifference towards its students' constitutional rights by failing to adopt an official policy to protect against the sexual abuse of students. See *Doe I*, 153 F.3d at 216-17. We also affirmed the district court's determination that Patrick was entitled to qualified immunity because although she had notice of the abuse as of the spring of 1986,[4] she did not act with deliberate indifference. See id. at 218-19. With respect to Plaintiffs' Title IX claim, we decided that pursuant to the Supreme Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), the Plaintiffs' complaint had stated a valid Title IX claim against DISD. See *id.* at 219. However, because we determined that there was insufficient evidence in the record to permit an adjudication on the merits of that claim, we remanded the case to the

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[4]We based this conclusion on undisputed evidence that J.H., a second-grade student at the time, told Patrick that McGrew had fondled him in the spring of 1986.

district court for further proceedings. See *id.* at 219-220. In so doing, we noted in dicta that we in no way intend to suggest that summary judgment would be inappropriate if Defendants are able to demonstrate, as they did with respect to Plaintiffs' § 1983 claims, that no genuine issue of material fact exists with respect to Plaintiffs' Title IX claim. Indeed, given the factual development that took place in this case with respect to the § 1983 claims against DISD and Patrick, we can say that if Plaintiffs can produce no additional evidence, Defendants will be entitled to summary judgment on the Title IX claim.

See *id.* at 220 n. 8.

On September 30, 1998, DISD filed a motion for summary judgment on Plaintiffs' Title IX claim. DISD argued that it could not be held liable under Title IX because Patrick was not a supervisory official, did not have actual notice of abuse, and did not act with deliberate indifference. In response, Plaintiffs contended that Patrick was a supervisory official with the power to stop the abuse, had actual notice of abuse both in 1984 and in 1986, and responded with deliberate indifference in both instances. In support of their opposition, Plaintiffs submitted evidence that had been submitted for the previous summary judgment motion and new evidence in the form of (1) a 1999 affidavit from D.D.P., a plaintiff; (2) a 1999 deposition by Bettye Burrell, Patrick's former secretary; (3) a 1999 affidavit by John McGrew; and (4) a 1999 deposition of Robert ***383** Johnston, Special Assistant to the Superintendent for Administration of DISD.

The district court granted DISD's motion on April 20, 1999. In its memorandum decision, the district court

assumed without deciding that Patrick was the appropriate person to be notified in order for DISD to be liable under Title IX. The court then discounted D.D.P.'s 1999 affidavit as a subsequent affidavit contradicting prior testimony without explanation, and held that Plaintiffs had offered insufficient evidence to create a genuine issue of material fact as to whether Patrick had actual notice of McGrew's misconduct in 1984. Furthermore, the court found that there was no evidence that any of the DISD officials and staff members who had allegedly been told of abuse prior to 1986 had communicated this information to Patrick. Finally, the court, citing our finding for the purposes of § 1983 in Doe I, held that Patrick's actions in response to the 1986 report of abuse did not rise to the level of deliberate indifference. On the same day, the district court entered a final judgment in favor of DISD and awarded it costs. Plaintiffs timely appeal.

II. DISCUSSION

Plaintiffs argue on appeal that the district court improperly disregarded a 1999 affidavit, and incorrectly concluded that Plaintiffs' evidence failed to create a genuine issue of material fact as to Patrick's deliberate indifference. We disagree.

A. Standard of Review

We review the grant of summary judgment de novo, applying the same criteria employed by the district court in the first instance. See *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir.1994). To prevail on summary judgment, a movant must demonstrate that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the movant succeeds in making that showing, the nonmoving party must set forth specific facts showing a genuine issue for trial and not rest upon the allegations or denials contained in its pleadings. See *FED. R. CIV. P.* 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). We review the evidence, and the inferences to be drawn therefrom, in the light most favorable to the nonmoving party. See *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1272 (5th Cir.1993).

B. Title IX

[1] Title IX provides, in pertinent part, that "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...." 20 U.S.C. § 1681(a). Although the statute provides for administrative enforcement of this mandate, the Supreme Court has held that Title IX is also enforceable through an implied private right of action. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). In *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), the Supreme Court subsequently established that monetary damages are available in such an action. See 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208. Franklin fur-

> ther stated that sexual harassment of a student by a teacher constitutes actionable discrimination for the purposes of Title IX. See *id.* at 75, 112 S.Ct. 1028.

[2][3] In *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998), the Supreme Court set forth the standard under which a school district may be held liable for damages under Title IX for a teacher's sexual ***384** harassment of a student. The Court held that

> in cases like this one that do not involve official policy of the recipient entity, ... a damages remedy [against the school district] will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

524 U.S. at 290, 118 S.Ct. 1989. The Supreme Court further decided in Gebser that "the response must amount to deliberate indifference to discrimination" for the school district to be liable in damages. *Gebser,* 524 U.S. at 290, 118 S.Ct. 1989. As this court noted in *Doe I*, "[t]he deliberate indifference standard is a high one." *Doe I*, 153 F.3d at 219 (applying deliberate indifference standard for purposes of § 1983 qualified immunity analysis). Officials may avoid liability under a deliberate indifference standard by responding reasonably to a risk of harm, "even if the harm ultimately was not averted." *Farmer v. Brennan*, 511 U.S. 825, 844, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); see also *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648, 119

S.Ct. 1661, 143 L.Ed.2d 839 (1999) (defining deliberate indifference for purposes of finding school district liability under Title IX for student-to-student harassment as when the "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances"). Moreover, determining what constitutes appropriate remedial action for allegations of discrimination in Title IX cases " 'will necessarily depend on the particular facts of the case....' " *Rosa H. v. San Elizario Independent School Dist.*, 106 F.3d 648, 660-61 (5th Cir.1997) (quoting *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 479 (5th Cir.1990) (Title VII decision)).

Thus, to defeat Defendants' motion for summary judgment, Plaintiffs must adduce evidence sufficient to create a genuine issue of material fact that Patrick (1) had authority to address the alleged abuse by McGrew and to institute corrective measures on DISD's behalf, (2) had actual notice of discrimination, and (3) acted with deliberate indifference. We agree with the district court that Plaintiffs have failed to create a genuine issue of material fact either with regard to Patrick's actual notice in late 1984 or with regard to whether Patrick's actions in response to the 1986 report amounted to deliberate indifference.

1. Supervisory Official with the Power to End the Abuse

As the district court noted, neither the Supreme Court nor this court has decided which individuals must have known of allegations of sexual abuse in order to support a finding that the school district had actual notice of discrimination. See Rosa H., 106 F.3d at 660 (limiting liability

to cases in which "those school employees in the chain of command whom the school board has appointed to ... remedy the wrongdoing themselves" had actual notice, without naming specific individuals). We agree with the district court that it is unnecessary to determine whether Patrick, as the principal of J.J. Rhoades, had the authority to take corrective action to end McGrew's abuse of students under DISD policies during the relevant period. Instead, we assume without deciding that Patrick was an official with the power to remedy discrimination on behalf of DISD for the purposes of determining whether Patrick had actual notice of discrimination and acted with deliberate indifference. We now turn to that inquiry.

2. Actual Notice

Whether an official had actual notice is a question of fact. See *Farmer*, 511 U.S. at 842, 114 S.Ct. 1970. Thus, the question of whether Patrick had actual notice may be resolved as a matter of law where, as here, the facts are not in dispute. See *Olabisiomotosho v. City of Houston*, 185 F.3d ***385** 521, 527-28 (5th Cir.1999) (finding no genuine issue of material fact as to actual notice). Plaintiffs contended before the district court that Patrick had actual notice that McGrew was abusing male students (1) in late 1984, when D.D.P., a plaintiff in this action, reported to her that McGrew had touched his genitals in the

lunchroom and had touched him on several occasions in McGrew's classroom, and (2) in the spring of 1986, when J.H. reported that McGrew had fondled him while he was bringing McGrew a note from another teacher. The district court found that Plaintiffs failed to create a fact issue as to whether Patrick had actual notice in 1984, but concluded that Patrick had notice in 1986. Plaintiffs appeal the first finding, and DISD complains of the second. We address each finding in turn.

a. 1984

In support of the contention that Patrick had notice in 1984, Plaintiffs submitted "new" evidence in the form of an affidavit by D.D.P.,[5] dated January 23, 1999 ("1999 affidavit").[6] The

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[5]D.D.P. is now twenty-two years old, and swore out the 1999 affidavit using his full name. For the sake of consistency, however, we will continue to refer to him as D.D.P.

[6]Plaintiffs also submitted the 1999 deposition of Bettye Burrell, Patrick's former secretary. Burrell testified that Patrick generally left her door open, and that Burrell was located about six feet from Patrick's office. Plaintiffs introduced this evidence in conjunction with D.D.P.'s 1996 deposition testimony stating that he told Patrick's office staff that McGrew had abused him, and that he could see Patrick talking on the phone in her office because her door was open at the time. Plaintiffs maintained before the district court that the sum of this evidence demonstrated that D.D.P. could have rationally believed that Patrick heard him when he reported the abuse to Patrick's office staff. The district court concluded that this evidence was speculative and thus insufficient to create a genuine issue of material fact. Plaintiffs do not explicitly challenge this conclusion on appeal, but argue that Burrell's deposi-

1999 affidavit is D.D.P.'s third recounting under oath of McGrew's abuse and the events that followed. In January 1988, D.D.P. swore out an affidavit before a Dallas police officer ("1988 affidavit"). He stated that in late November 1984, McGrew touched his genitals in the lunchroom. D.D.P. further stated that after this occurred, he "went down to the office and told Ms. Patrick and Mr. Beckham about what happened."

D.D.P. was subsequently deposed in 1996. In his deposition, D.D.P. stated that McGrew had touched his genitals in the lunchroom, and that McGrew had also abused him several times in McGrew's classroom. He further stated that he told the administrative staff in Patrick's office of McGrew's act, but that Patrick was actually in her office, talking on the phone, at the time. When asked, "You never actually had a conversation with Ms. Patrick about what Mr. McGrew did to you, did you?" D.D.P. answered, "No." D.D.P. also stated that he never put his accusations in writing.

Footnote 6 continued.

deposition, constitutes "powerful additional evidence" supporting a denial of summary judgment.

[4] The 1999 affidavit asserts that D.D.P.'s 1988 affidavit, in which he stated that he told Patrick that McGrew had abused him, is accurate; and that D.D.P.'s 1996 deposition, in which he stated that he told the people in Patrick's office but not Patrick herself that McGrew had abused him,[7] is not. In the 1999 affidavit, D.D.P. states that the incident was fresh in his memory in 1988, and that he gave a truthful statement at that time. D.D.P. then explains that after the incident with McGrew, D.D.P. "tried hard over the years not to think about it and put it out of my head," and therefore that by 1996, he "did not have enough memory of what really happened to allow [him] to testify fully and accurately about what Mr. McGrew did or ***386** [his] report of what [McGrew] did." D.D.P. further asserts in the 1999 affidavit that he was not shown his 1988 affidavit during his deposition, and that he was not asked during his deposition why his testimony had changed between 1988 and 1996. The affidavit concludes that, as a result, the 1988 affidavit, not the 1996 deposition, is an accurate

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[7]The district court concluded that there was no evidence that the office staff, or any other school personnel, communicated allegations of abuse by McGrew to Patrick. Plaintiffs do not challenge this conclusion on appeal.

account of his communication with school personnel.

The district court ruled that the 1999 affidavit contradicted the 1996 deposition testimony, and cited authority from our circuit holding that a plaintiff may not manufacture a genuine issue of material fact by submitting an affidavit that impeaches prior testimony without explanation. This authority stands for the proposition that a nonmoving party may not manufacture a dispute of fact merely to defeat a motion for summary judgment. See *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir.1996) (citations omitted); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 136 n. 23 (5th Cir.), cert. denied, 506 U.S. 845, 113 S.Ct. 136, 121 L.Ed.2d 89 (1992) (citations omitted); *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223, 228, 233 n. 9 (5th Cir.1984). As some of our sister circuits have observed,

If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Perma Research and Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir.1969) (citations omitted); see also *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365-66 (8th Cir.1983) (stating that courts should scrutinize conflicts between affidavit and deposition testimony and only grant summary judgment when those conflicts raise only sham issues); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir.1975) (quoting Perma Research).

Plaintiffs argue on appeal that the district court erred in disregarding this 1999 affidavit and the 1988 affidavit that it endorses. They contend that the 1999 affidavit explained why the 1996 deposition testimony differed from the version of events contained in the 1988 affidavit, and thus that the rule should not have been applied.[8] We disagree.

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[8]Plaintiffs also argue that the application of the rule subverts Federal Rule of Evidence 803(5). See *Fed.R.Evid.* 803(5) (creating a hearsay exception for recorded recollections, defined as "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly."). We are unpersuaded by this argument. Rule 803(5) pertains to the admissibility of recorded recollections, and the admissibility of the 1988 affidavit has not been disputed. Plaintiffs cite no authority for the proposition that Rule 803(5) is frustrated when a court

Instead, we are convinced that the explanation offered by the 1999 affidavit was insufficient to create a genuine issue of material fact on the issue of whether D.D.P. directly told Patrick of the abuse by McGrew. There is no allegation that D.D.P. was not represented by counsel at the 1996 deposition; he was thoroughly questioned about his communications with school personnel; and the testimony was unequivocal. *Cf. Clark v. Resistoflex Co., A Div. of Unidynamics Corp.*, 854 F.2d 762, 766-67 (5th Cir.1988) (summary judgment based on fact issue raised by subsequent affidavit was appropriate when attorney only asked one question on subject at deposition and thus affidavit supplemented deposition testimony). Furthermore, in his 1996 deposition, D.D.P. responded to certain questions by stating that he could not answer because he did not recall what had happened. Thus, he knew that if he did not remember whether ***387** a particular event had occurred or the details of how that event occurred, he could say, "I do not recall" in response to a question regarding that event during his deposi-

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Footnote 8 continued.

declines to consider contradictory evidence contained in a recorded recollection in the form of an affidavit, and our research has likewise uncovered none.

tion. However, he failed to do so when asked whether he directly told Patrick about the abuse. Although we sympathize with D.D.P.'s desire to eradicate the painful memory of the abuse, we cannot say that D.D.P.'s assertions in a 1999 affidavit that he succeeded in doing so by 1996 create an issue of fact as to whether he told Patrick that McGrew had abused him in 1984. Thus, in the absence of a dispute of fact, the district court correctly held as a matter of law that Patrick did not have actual notice in 1984.

b. 1986

The undisputed summary judgment evidence demonstrates that in the spring of 1986,[9] Sandra Thomas reported to Claude Bandy, the parent ombudsman for J.J. Rhoades, that her son J.H. claimed that McGrew had fondled him. The evidence further shows that Bandy informed Patrick of J.H.'s allegation, and that Thomas spoke to Patrick by telephone. After speaking to his mother on the phone, Patrick called J.H. down to her office and asked him to describe to her what

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[9]The district court noted that Patrick testified at McGrew's trial that J.H's complaint was brought in 1986, but testified at her deposition for this action that the complaint was brought in 1987. Like the district court, we assume for the purposes of this discussion that the incident occurred in 1986.

happened. He reported that his teacher had sent him into McGrew's classroom with a note, and that McGrew had touched him "in his private place" while he was standing at McGrew's desk. Thomas came to J.J. Rhoades the next day to meet with Patrick and McGrew. Prior to the meeting with McGrew, Patrick spoke to Thomas and J.H.

Based on this undisputed evidence, the district court concluded that Patrick had actual notice of an allegation of sexual abuse in spring 1986. In its Brief of Appellee, DISD argues that knowledge of a mere allegation of abuse does not constitute actual knowledge that a student is being abused. DISD also contends that "[a]n allegation that is investigated and determined to be untrue should not form the basis of actual knowledge even if that determination is tragically flawed." We decline to address these arguments because the facts of this case do not require us to decide whether Patrick had actual notice of discrimination. Instead, we assume arguendo that she did, and proceed to the question of whether Patrick's actions in response to J.H.'s 1986 allegation of sexual abuse by McGrew amounted to deliberate indifference.

3. Deliberate Indifference

[5] Whether an official's response to actual knowledge of discrimination amounted to deliberate indifference likewise may appropriately be determined on summary judgment. See *Davis*, 526 U.S. at 649, 119 S.Ct. 1661; *Doe I*, 153 F.3d at 219 (deciding on summary judgment that school officials were entitled to qualified immunity because they did not act with deliberate indifference). As discussed above, the undisputed summary judgment evidence demonstrates that Patrick spoke to Sandra Thomas on the phone, and told her to come to school for a meeting with Patrick and McGrew. When Thomas and J.H. arrived at school, Patrick spoke to both of them. At some point, Patrick also asked J.H. to repeat his accusation to McGrew. During the meeting, Patrick and Thomas both asked McGrew directly if he had fondled J.H., and he denied it.[10] At ***388** the close of the meeting, Patrick told Thomas that she would make sure that J.H. was not sent to McGrew's classroom again. Once Thomas had left, Patrick told McGrew that the accusation was very serious, and

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[10]Patrick testified that McGrew denied the allegation and offered no explanation for why the report might have been made. McGrew stated in his 1999 affidavit that he told Thomas and Patrick that he had not "touched" J.H., but had spanked him, and that J.H. was "mad" because of the spanking. We think that these slightly different versions do not create an issue of fact as to deliberate indifference.

> led him to understand that he should not repeat the behavior that made the child accuse him of abuse. McGrew remembers this warning somewhat differently: "She told me the school does not put up with the kind of behavior I had been accused of and that if it really did take place, I would be dealt with." Patrick also spoke to J.H.'s teacher, who confirmed that she had sent him to McGrew's classroom with a note, and who stated that J.H. had not mentioned any misconduct by McGrew to her when he returned to her classroom.

Plaintiffs argue that the evidence demonstrates that Patrick's investigation was a sham, and that, in fact, she desired to cover up J.H.'s allegation of sexual abuse in order to protect J.J. Rhoades' reputation. In support of that argument, Plaintiffs point to evidence that Patrick asked another student, W.J.H., during the 1983-84 school year whether McGrew had touched him inappropriately. In addition, Plaintiffs submitted evidence that Patrick informed Thomas that McGrew was a good teacher and that Patrick knew J.H. was lying; that Patrick asked Thomas to not discuss J.H.'s accusations with any other teachers or parents; and that Patrick acted "nasty" towards Thomas. Other evidence indicated that Patrick told McGrew, prior to the meeting with Thomas, "McGrew, I don't think [the accusation is] true, but we have to meet with the parent and discuss it." McGrew also described Patrick's demeanor towards him as "supportive." Finally, Plaintiffs submitted the deposition testimony of Robert L. Johnston, Special Assistant to the Superintendent for Administration of DISD, who testified that he found no documents refer-

ring to McGrew or Plaintiffs in the context of sexual abuse allegations in files kept at J.J. Rhoades. From this, Plaintiffs would have us infer that Patrick intentionally failed to document J.H.'s allegation so that the report would be easier to cover up.

Plaintiffs also contend that Patrick was deliberately indifferent because she failed to perform certain actions pursuant to her investigation of J.H.'s allegation. In particular, Plaintiffs point to the fact that Patrick failed to report J.H.'s allegation to Child Protective Services, failed to tell McGrew not to spank a child again, failed to monitor McGrew further or make him attend additional training, and failed, in fact, to ever raise the issue of sexual abuse with him again until his arrest. Thus, Plaintiffs argue, they have presented sufficient evidence of deliberate indifference to preclude a grant of summary judgment in favor of DISD.

However, even drawing all reasonable inferences in favor of Plaintiffs, we must agree with the district court that Plaintiffs have failed to create a genuine issue of material fact. Patrick interviewed J.H., spoke with his mother, spoke with J.H.'s teacher, spoke with McGrew and warned him either that he would be "dealt with" if the accusations were founded or that he should avoid acting in a way that could be misconstrued. She concluded, in error, that J.H.'s allegation was not true, and her erroneous conclusion had tragic consequences. However, we cannot say on the facts before us that these actions, though ineffective in preventing McGrew from sexually abusing students, were an inadequate response to J.H.'s allegation. See *Doe I*, 153 F.3d at 219 ("We can foresee many good faith but ineffective responses that might satisfy a school official's obligation in these situations, e.g., warning the state actor, notifying the

student's parents, or removing the student from the teacher's class.") (quoting *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456 n. 12 (5th Cir.) (en banc), cert. denied sub nom. *Lankford v. Doe*, 513 U.S. 815, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994)); *cf. Davis*, 526 U.S. at 648, 119 S.Ct. 1661 (refusing to hold that ***389** "administrators must engage in particular disciplinary action" to avoid liability). As a result, we conclude that the district court correctly granted summary judgment in favor of DISD.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3:93-CV-1913-G
CONSOLIDATED WITH
3:95-CV-2799-G

JOHN DOE, ET AT.,
Plaintiffs,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT
Defendant,

BOB BLACK, ET AL.,
Plaintiffs,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Defendant.

April 20, 1999

MEMORANDUM ORDER

Before the court is the motion of the defendant Dallas Independent School District ("the DISD") for summary judgment on the claims remaining in this case. For the reasons stated below, the defendant's motion is granted.

I. BACKGROUND

Between 1982 and 1987, the plaintiffs in this case were students at Joseph J. Rhoads Elementary School ("Rhoads Elementary School") in the DISD. Plaintiffs' Second Amended Complaint ("Complaint") ¶14. Each of the plaintiffs, with the exception of Bob Black, was a student in John Earl McGrew's ("McGrew") third-grade classroom for one year. Complaint ¶¶ 14-15. Barbara Patrick ("Patrick") was the principal of Rhoads Elementary School throughout McGrew's tenure. During this period, McGrew sexually abused numerous male students. *See* Plaintiffs' Brief in Response to Defendant Dallas Independent School District's Motion for Summary Judgment ("Response") at 1-2.

Each of the plaintiffs was under ten years of age when McGrew began engaging in inappropriate sexual conduct with him. Complaint ¶ 17. From 1982 to 1988, McGrew was also a scoutmaster for a Boy Scout troop of which the plaintiffs were members. Complaint ¶ 16. The sexual conduct allegedly occurred both at school and at McGrew's home. Complaint ¶¶ 18-19.

McGrew was arrested in December of 1987. Complaint ¶ 29. On July 29,1988, he was convicted of one felony count of aggravated sexual assault and two felony counts of indecency with a child, and was sentenced to imprisonment for life plus two twenty year terms. McGrew is currently incarcerated in the Texas Department of Criminal Justice. Defendant DISD's Memorandum in Support of its Motion for Summary Judgment at 1; Response at 6.

This case, originally filed in state court on August 20, 1993, was brought by John Doe, Joe Doe, Ms. Roe as Next Friend of Jack Roe, and Ms. Smith as Next Friend

of James Smith ("original plaintiffs"),[1] against the DISD, McGrew, the Boy Scouts of America, Circle Ten Council, Inc.: Boy Scouts of America, Rhoads Elementary School, Linus Wright ("Wright"), Marvin Edwards ("Edwards"), and Patrick.[2] The original suit alleged claims under (1) 42 U.S.C. § 1983, (2) Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"), (3) the Texas Constitution, and (4) Texas tort law.

The case was timely removed to this court on September 22, 1993. The plaintiffs filed their First Amended Complaint on March 2, 1994, and a Second Amended Complaint July 25, 1996. On November 24, 1995, Bob Black, Ms. Black as Next Friend of Bill Black, Ms. White as Next Friend of William White and George Green ("consolidated plaintiffs," together with the original plaintiffs, "the plaintiffs") filed suit against the same defendants, asserting the same set of facts and causes of action. On February 20, 1996, this court consolidated the two cases.

On March 29, 1995, this court dismissed the plaintiffs' Title IX claims with prejudice;[3] declined to dismiss their § 1983 claims against the DISD, Wright, and Patrick; dismissed all causes of action against the defen-

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[1]To protect the identities of the victims, fictitious names were used to designate them in their pleadings. However, their actual initials were used to identify them in depositions and affidavits.

[2]All of the defendants except the DISD have since been dismissed from the case. As these dismissals are not longer subject to appeal, the other defendants will not be mentioned further unless their conduct bears on the asserted liability of the DISD.

[3]The court concluded, based on Fifth Circuit precedent which has since been overruled by the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998), that same-sex sexual harassment was not actionable under Title IX.

dant Edwards with prejudice; declared that the plaintiffs had failed to allege any common law torts committed by the defendants; and refused to dismiss their claims under the Texas Constitution. *See* Memorandum Order of March 29, 1995.

On June 9, 1995, this court reconsidered and granted the defendants' motion to dismiss the plaintiffs' claims for damages under the Texas Constitution. The plaintiffs later dismissed with prejudice all of their remaining claims under the Texas Constitution. Order of Dismissal of March 5, 1997. On July 30, 1996, the DISD and Patrick moved for summary judgment on all claims asserted by the plaintiffs under § 1983 on the grounds that (1) no basis existed for holding DISD liable for the conduct of McGrew, and (2) Patrick was entitled to qualified immunity.

On October 29, 1996, the court granted this motion for summary judgment The plaintiffs' petition for interlocutory appeal was denied by the Court of Appeals on February 20, 1997. This court entered final judgment for the defendants on March 6, 1997, whereupon the plaintiffs timely appealed.

The Court of Appeals decided the appeal on August 27, 1998 in *Doe v. Dallas Independent School District,* 153 F.3d 211 (5th Cir. 1998), in which it affirmed this court's grant of summary judgment for the defendants-appellees on the § 1983 claims, reversed the dismissal of the Title IX claim, and remanded the case for further proceedings consistent with these rulings. On September 30, 1998, the DISD filed the instant motion for summary judgment. *See* Defendant Dallas Independent School District's Motion for Summary Judgment ("Motion").

II. ANALYSIS

Evidentiary Burdens on Motion for Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).[4] "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving part[ies]." *Id.*

The party moving for summary judgment makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal that there are no genuine material fact issues to support the nonmovants' case. See *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). The pleadings, depositions, admissions, and affidavits, if any, must demonstrate that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c). The movant need not support the motion with evidence negating the nonmovants' case. *Celotex*, 477 U.S. at 325.

Once the movant makes the requisite showing, the nonmovants may not rest on the allegations in their pleadings. *Isquith for and on behalf of Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 199 (5th Cir.), *cert.*

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[4] The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve a just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." 11 *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir. 1986).

denied, 488 U.S. 926 (1988). Rather, they must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex,* 477 U.S. at 323-24. To carry this burden, the motion's opponents must do more than simply show some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation,* 475 U.S. 574, 586 (1986). Instead, they; must show that the evidence is sufficient to support a resolution of the factual issue in their favor. *Anderson,* 477 U.S. at 249.

All of the evidence must be viewed, however, in a light most favorable to the plaintiffs as the motion's opponents. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Summary judgment is properly entered in favor of the defendants if, after adequate time for discovery, the plaintiffs fail to establish the existence of an element essential to their case and as to which they will bear the burden of proof at trial. *Celotex,* 477 U.S. at 322-23.

The Plaintiffs' Claims Under Title IX

The only claims remaining in this case are those asserted by the plaintiffs under Title IX. Title IX provides:

> [N]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681 (a).

The express statutory means of enforcing Title IX is administrative, as the statute directs federal agencies

who distribute education funding to establish requirements in furtherance of the nondiscrimination mandate and allows them to enforce those requirements through "any ... means authorized by law," including Ultimately the termination of federal funding. *Gebser v. Lago Vista Independent School District,* 524 U.S. 274, _, 118 S.Ct. 1989, 1994 (1998).

The Supreme Court held in *Cannon v. University of Chicago,* 441 U.S. 677, 717 (19 79), that Title IX is also enforceable through an implied private right of action. In *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 76 (1992), the Court held that monetary damages are available under Title IX in an action against a school district to redress a teacher's sexual harassment of a student, although it made no effort to delineate the circumstances in which that remedy would lie.

That question, however, was squarely addressed in *Gebser.* In deciding when a school district may be liable in damages for the sexual harassment of a student by one of the district's teachers, the Court held:

> [D]amages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.

Gebser, 524 U.S. at___, 118 S.Ct. at 1993.[5]

[5] The Court concluded that it would "frustrate the purposes" of Title IX to allow a recovery in damages against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice. *Gebser,* 524 U.S. at_, 118 S.Ct. at 1997. In determining that the appropriate standard was one of actual notice, the Court explained:

Footnote 5 Continued

> As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs.
>
> Congress enacted Title IX in 1972 with two principal objectives in mind: "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." The statute was modeled after Title VI of the Civil Rights Act of 1964, which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs. The two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.
>
> That contractual framework distinguishes Title IX from Title VII which is framed in terms not of a condition but of an outright prohibition. Title VII applies to all employers without regard to federal funding and aims broadly to "eradicat[e] discrimination throughout the economy." Title VII, moreover, seeks to "make persons whole for injuries suffered through past discrimination." Thus, whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on "protecting" individuals from discriminatory practices carried out by recipients of federal funds.

Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power, . . . we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. Our central concern in that regard is with ensuring "that the receiving entity of federal funds [has] notice that it will be liable for a monetary award." . . If a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or *respondeat superior* it will likewise be the case that the recipient of funds was unaware of the discrimination. It is sensible

In three cases handed down shortly before the Supreme Court's recent *Gebser* decision,[6] the Court of Appeals addressed the issue of school district liability

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Footnote 5 Continued

to assume that Congress did not envision a recipient's liability in damages in that situation.

Id. at 1997-98 (citations omitted).

When the DISD accepted federal funds, it agreed not to discriminate on the basis of sex, but that is not to say that it also agreed to be liable whenever one of its employees discriminates on the basis of sex. *Rosa H. v. San Elizario Independent School District,* 106 F.3d 648, 654 (5th Cir. 1997). As the court noted in *Canutillo Independent School District v. Leija* 101 F.3d 393 (5th Cir. 1996), *cert. denied,* 520 U.S. 1265 (1997):

> [T]here is no sound policy reason to hold a school district financially accountable, through strict liability, for the criminal acts of its teachers.
>
> As horrible a crime as child abuse is, we do not live in a risk-free society; it contorts "public policy" to suggest that communities should be held financially responsible in this manner (strict liability) for such criminal acts of teachers.

Id. at 399.

For the above reasons, this court concludes that actual notice is the requisite threshold. Any standard less demanding than actual notice would result in school district liability in virtually every case of teacher-student harassment.

[6] These cases are *Canutillo Independent School District v. Leija,* 101 F.3d 393 (5th Cir. 1996), *cert. denied,* 520 U.S. 1265 (1997); *Rosa H. v. San Elizario Independent School District* 106 F.3d 648 (5th Cir. 1997); and *Doe v. Lago Vista Independent School District* 106 F.3d 1223 (5th Cir. 1997), *aff'd,* 524 U.S. 274 (1998). A fourth case previously decided by this court, *Doe v. Granbury ISD,* 19 F.Supp.2d 667 (N.D. Tex. 1998), is also relevant. Given the highly fact-specific nature of the required analysis, the facts of these four cases will be recounted in detail for comparison with the instant case.

Footnote 6 Continued

The facts of *Gebser* are as follows:

Gebser, a high school student in the Lago Vista Independent School District, had a sexual relationship with Waldrop, one of her teachers. 118 S.Ct. at 1993. She did not report the relationship to school officials. During the time of the alleged relationship, the district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints, nor had it issued a formal antiharrassment policy. *Id.*

In October 1992, the parents of two other students complained to the high school principal about comments made by Waldrop in class. The principal arranged a meeting, at which, according to the principal, Waldrop indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again. The principal also advised Waldrop to be careful about his classroom comments. The principal told the school guidance counselor about the meeting but he did not report the parents' complaint to Lago Vista's superintendent, who was the district's Title IX coordinator. *Id.*

A couple of months later, in January of 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. Lago Vista then terminated his employment. *Id.* The district court determined that the parents' complaint to the principal concerning Waldrop's comments in class was the only one Lago Vista had received about Waldrop, but that that evidence was inadequate to raise a genuine issue as to whether the school district had actual [or constructive] notice that Waldrop was involved in a sexual relationship with a student. The Court of Appeals for the Fifth Circuit affirmed. See *Doe v. Lago Vista School District,* 106 F.3d 1223, 1224-25 (5th Cir. 1997).

In holding that Gebser could not prevail under an actual notice standard, the Court noted that "Lago Vista, moreover, terminated Waldrop's employment upon learning of his relationship with Gebser." *Gebser,* 118 S.Ct. at 2000. While Gebser focused on Lago Vista's asserted failure to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims, the Court held that this alleged failure to comply with federal regulations did not establish the requisite actual notice and deliberate

for teacher-student sexual abuse. In *Canutillo Independent School District v. Leija,* 101 F.3d 393 (5th Cir. 1996), *cert. denied,* 520 U.S. 1265 (1997), the court held:

> [B]efore the school district can be held liable under Title IX for a teacher's hostile environment sexual abuse, someone in a management-level position must be. advised about (put on notice of), that conduct, and that person must fail to take remedial action.

101 F.3d at 401.[7]

Footnote 6 continued.

indifference. The Court noted that the implied right of action under Title IX does not provide for recovery in damages for violation of administrative requirements. *Id.*

As in *Gebser,* plaintiffs in the instant case did not inform Patrick (the principal) of the sexual harassment. In both cases, when a third party reported the alleged abuse, the principal confronted the teacher, gave him a warning, but did not report it further. Here, as in *Gebser,* the one report to Patrick in the spring of 1986 was insufficient to place her on notice of the substantial risk of sexual abuse to students.

[7]The facts of *Leija* are as follows:

In 1989 at the Canutillo Elementary School, Rosemary Leija was assigned to the second grade homeroom class of Pam Mendoza and the physical education /health class of Tony Perales. 101 F.3d at 3 95. Perales' classes were a part of the daily curriculum. Once a week, he taught health, which consisted primarily of showing movies to his students in a darkened classroom. Throughout the 1989-90 school year, Perales sexually molested Leija during these showings.

In early 1990, Leija and another student told Mendoza about some of Perales' actions. Mendoza spoke with each of the girls individually and told them to avoid Perales. Mendoza talked to Perales about the accusations, but she did not advise anyone else, such as the superintendent or principal. Later that spring, Leija told her

In *Rosa H. v. San Elizario Independent School District,* 106 F.3d 648 (5th Cir. 1997), the court held:

> Title IX liability for sexual harassment will not lie if a student, fails to demonstrate that the school district actually knew that the students faced a substantial threat of sexual harassment. In other words, the district can escape liability if it can show "that [it] did not know of the underlying facts indicating a sufficiently substantial danger and that [it was] therefore unaware of a danger, or that [it] knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent."

Footnote 7 continued.

mother that Perales had been touching her. Leija's mother discussed the matter with Mendoza at one of the regularly scheduled parent-teacher conferences, and Mendoza told her-that she would look into the matter. According to Leija, Mendoza confronted her after the conference and threatened her with trouble if she was lying about her accusation. Afterwards, Leija did not speak to anyone about the abuse until she began counseling sessions in 1993.

On these facts, the *Leija* court decided that notice to Mendoza was not sufficient notice to the school district to invoke liability under Title IX:

> [I]t is clear that Mendoza, the teacher put on notice, did not have the requisite authority [to address Perales' sexual harassment]. At the elementary school, she served only in the capacity of a classroom teacher. Mendoza did not serve on the school board or as a superintendent, assistant superintendent, principal, or assistant-principal. ... Mendoza simply had no job-related authority over Perales or, for that matter, any other teacher.

101 F.3d at 402.

106 F.3d at 659 (citing *Farmer v. Brennan*, 511 U.S. 825, 843-44 (1994)).[8]

Seven days after *Rosa H.* was handed down, the Court of Appeals revisited the issue of when a school district

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[8]The facts of *Rosa H.* are as follows:

In the fall of 1992, Deborah H. entered San Elizario High School, where she had a sustained sexual relationship with Contreras, the school's karate instructor. 106 F.3d at 650. The relationship ultimately caused Deborah to become suicidal, to be committed to a psychological hospital, and to leave San Elizario before the end of the academic year. The school district employed Contreras from the fall of 1992 until the spring of 1994, when it fired him for reasons unrelated to the facts of the case. *Id.* There was no evidence that the twenty-nine-year-old Contreras had a history of sexual offenses or was a danger to children.

Deborah testified that in February she visited Julian Encina, the high school counselor, and confided that she had been having sex with Contreras. Encina admitted before the jury that he had counseled Deborah roughly once a week, but he denied that Deborah told him anything confidentially about her relations with Contreras. *Id.* at 651. Brenda Soto, a social worker employed by the district,testified that Encina informed her in February that Deborah and Contreras might be having some sort of a relationship. She passed this information on to Frank Duran,the director of San Elizario's special programs.

On the morning of February 22, Deborah's mother discovered Deborah at Contreras's house during school hours. She became suspicious of Contreras's relationship with her daughter. Later that morning, she and Deborah met with Encina and Robert Longoria, the high school principal. Deborah became upset during the meeting, and when Contreras's name came up she blurted out: "Well, what do you want me to tell you, mom? Do you want me to tell you that I'm fucking him? Well, I'm not going to tell you that because its not true." Longoria, who was unaware of the karate program and had not met Contreras, testified that he regarded the outburst as part of a typical family quarrel rather than as an indication that Contreras was sexually abusing Deborah. *Id.*

incurs Title IX liability for a teacher's sexual harassment of a student. In *Doe v. Lago Vista Independent School District,* 106 F.3d 1223 (5th Cir. 1997), the court held:

Footnote 8 continued.

School officials attended an April 5 hearing and heard Deborah describe her relationship with Contreras. The school superintendent, Beatriz Curry, called a meeting the next day to discuss how the school should respond to Deborah's situation. Principal Longoria, Duran, Encina, Soto, and another school social worker, Linda Apodaca, attended the meeting. After an initial decision to suspend the karate program, Superintendent Curry decided to continue to have Contreras offer classes under close monitoring. *Id.* Curry asked her staff to write down whatever they knew about Deborah's relationship with Contreras and to collect information to determine whether the school should make a report to law enforcement authorities. But the school did not mount a full-scale investigation into whether Contreras posed a risk of sexual abuse, nor did it notify Fran Hatch, the school's Title IX coordinator, that Contreras has sexually abused Deborah. School officials did not report Contreras to law enforcement authorities. He worked at San Elizario High School for another year under heightened supervision. In the spring of 1994, the school district fired him because he failed repeatedly to supply the district's personnel office with an adequate photo identification.

The facts of *Rosa H.* thus indicate that (1) another teacher may have seen the offending teacher kiss a student; (2) a counselor was told of the relationship; (3) a meeting was held with the principal where the potential relationship was discussed; and (4) even after the relationship was confirmed by the plaintiff, the teacher continued to work for a full year under "close monitoring" and was eventually fired for reasons unrelated to the case. In the instant case, by contrast, once the allegations were confirmed by the plaintiffs at the time of McGrew's arrest, McGrew never returned to the classroom. Moreover, he was promptly terminated after his criminal conviction.

> [S]chool districts are not liable in tort for teacher-student [sexual] harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

106 F.3d at 1226.

Liability is based on a subjective standard, that is, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference." *Doe v. Granbury Independent School District,* 19 F.Supp.2d 667, 677-78 (N.D. Tex. 1998) (quoting *Farmer,* 5 11 U.S. at 837).[9] What is appropriate remedial action

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[9]The facts of *Granbury* are as follows:

Plaintiffs alleged that while attending Granbury Middle School, Jane Doe II was sexually harassed and assaulted by her band director, John Talmage; and, while a student at Granbury High School, Jane Doe II was sexually harassed and assaulted by her high school band director, Richard Lee. 19 F.Supp.2d at 670. At the times relevant, Harris was the superintendent of Granbury ISD, Green the principal of Granbury High School, and Grissom the principal of Granbury Middle School.

In September 1995, Grissom was approached by a parent who noted that Talmage had been observed holding hands with a young woman at a Granbury Middle School open house. *Id.* at 673. Grissom discussed that matter with Talmage, who was romantically involved at the time with the young woman's mother, and Talmage informed Grissom that he had attended the open house as the girl's parent. Grissom noted that Talmage was not married to the mother and requested him not to hold hands in a similar manner in the future. On December 4, 1995, a detective from the Granbury Department of Police Services informed Grissom that another officer had reportedly witnessed Talmage embracing a female and possibly nibbling on her ear. *Id.*

Footnote 9 continued.

On September 30, 1996, Green met with Pam Carver, who informed him that during a conversation in Lee's office on or about September 19, 1996, she thought she had observed Lee make contact with Jane Doe II's leg and that Jane Doe II may have also made contact with Lee's leg. *Id.* at 672. Carver said that she felt uncomfortable about what had occurred. Following that meeting, Green met with Lee to discuss the allegations of Carver. Green instructed Lee that if his plans for the evening involved any interaction with students, that he was to change his plans. *Id.*

On October 7,1996, Harris learned from representatives of the District Attorney's office that Talmage and Lee were being investigated on charges that they had engaged in indecency with a child and he was asked to attend a meeting with representatives of the Granbury Department of Police Services and the District Attorney's office. That afternoon, Lee left the Granbury High School campus and did not return. On October 8, Harris suspended Talmage from his teaching duties and instructed him to leave Granbury ISD property and to have no contact with students. On October 9, Lee submitted his resignation. *Id.* at 671-72.

The *Granbury* court held:

The summary judgment evidence establishes that each time a report of suspected inappropriate activity was made, Green and Grissom reacted appropriately. Specifically, after Carver informed him of her experience, Green investigated the allegations. He discussed the situation with his supervisor and together they devised a plan of action. Green met with Lee and then with [Jane Doe II and her mother]. Even if Green downplayed the significance of Carver's allegations, as alleged by [the mother], his statements in that regard would have been reasonable to calm [the mother].

Grissom's failure to document these incidents does not support a finding of deliberate indifference. There is no summary judgment evidence that Grissom learned of any facts or of a pattern of inappropriate sexual behavior by Talmage pointing plainly toward the conclusion, that Talmage was sexually abusing Jane Doe II. Much less is there any summary judgment evidence that Grissom demonstrated deliberate indifference toward the constitutional rights of Jane Doe II. ... Finally, there is no summary

will necessarily depend on the particular facts of the case. *Rosa H.*, 106 F.3d at 660-61 (citing *Waltman v. International Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989)). Of course, prompt termination or suspension of the offender would ordinarily be sufficient. *Rosa H.*, 106 F.3d at 661.

In short, a damages remedy will not lie unless an official who, at a minimum, has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf, has actual knowledge of the discrimination and fails adequately to respond. *Gebser*, 118 S.Ct. at 1999. The response, as *Gebser* instructs, must amount to deliberate indifference to discrimination. *Id.*

An Appropriate Official

Neither the Supreme Court nor the Fifth Circuit Court of Appeals has yet decided which individuals within the school district must have known about the sexual abuse before the school district can be held to

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Footnote 9 continued.

judgment evidence of deliberate indifference on the part of Harris. . . . The day after Harris learned of the allegations against Talmage, he suspended Talmage from his teaching duties and instructed him to leave Granbury ISD property and to have no contact with students. Harris accepted Lee's resignation on behalf of the board of trustees of Granbury ISD.

As discussed above, there is simply no evidence that any official had any knowledge of abuse of Jane Doe II by Talmage, much less failed to take action to stop it. And, although evidence of some activity between Lee and Jane Doe II was brought to the attention of Green, the evidence reflects that he took action to investigate the allegations.

Id. at 675-78.

have had actual knowledge of the abuse. See *Rosa H.*, 106 F.3d at 659.[10] It is unnecessary to decide in this case

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[10]As the court in *Rosa H.* explained:

> At one end of the spectrum, liability might lie only when a member of the school board actually knows of the abuse and fails to take prompt remedial action. Under this rule, a school district would virtually never face penalties for sexual abuse of students unless school board members themselves intended the harm. By the same token, victims of abuse would virtually never be able to recover, especially in large school districts, in which school board members have little contact with the day-to-day interactions between teachers and students.... At the other end of the spectrum, liability might lie whenever any school employee other than the perpetrator has actual knowledge of the abuse and fails to take prompt remedial action. Although more protective of victims of abuse, this scheme would vitiate the premise that has guided our analysis of Title IX sexual-abuse cases: that Title IX creates liability for school districts only when the school district intentionally breaks the strings attached to those funds.
>
> Formulating the sort of meaningful tort liability envisaged by the *Franklin* Court while recognizing that Title IX generates liability only for intentional wrongs requires us to chart a middle way between these extremes. As we noted in *Leija*, 101 F.3d at 401, school districts contain a number of layers of responsibility below the school board: superintendents, principals, vice-principals, and teachers and coaches, not to mention specialized counselors such as Title IX coordinators. Different school districts may assign different duties to these positions or even reject this traditional hierarchical structure all together. We do not wish to restrict the applicability of our analysis by keying liability to certain job titles within the school system. Whether the school official is a superintendent or a substitute teacher, the relevant question is whether the official's actual knowledge of sexual abuse is functionally equivalent to the school district's actual knowledge.

whether the appropriate person to be notified is a Title IX coordinator, vice-principal, principal, superintendent, or other employee. Obviously, that question is strongly linked to the facts and circumstances, including applicable state law, of each case. *Leija,* 101 F.3d at 401. For the purposes of this motion, the court will assume -- as contended by the plaintiffs -- that Patrick is an official of the DISD who, at a minimum, had authority to institute corrective measures on the district's behalf. But see *Leija,* 101 F.3d at 402 ("it may well be that someone must be a member of the school board.").

Footnote 10 continued.

> This inquiry circumscribes those school employees in the chain of command whom the school board has appointed to monitor the conduct of other employees and, as distinguished from reporting to others, remedy the wrongdoing themselves. At the same time, it locates the acts of subordinates to the board at a point where the board's liability and practical control are sufficiently close to reflect its intentional discrimination. It does so by omitting, the bulk of employees, such as fellow teachers, coaches, and janitors, unless the district has assigned them both the duty to supervise the employee who has sexually abused a student and also the power to halt the abuse.
>
> In order to qualify as a supervisory employee whose knowledge of abusive conduct counts as the district's knowledge, a school official must at least serve in a position with the authority to "repudiate that conduct and eliminate the hostile environment" on behalf of the school district.

Id. at 65 9-6 1 (citing *Nash v. Electrospace System, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993)).

D.D.P.'s Second Affidavit

It is well settled that this court does not allow a party to defeat a motion for summary judgment using an affidavit that impeaches, without explanation, his own prior testimony in an attempt to manufacture a material disputed issue of fact.[11] *S.W.S. Erectors, Inc. v. Infax,* 72 F.3d 489, 495 (5th Cir. 1996) (citing *Thurman v. Sears, Roebuck & Co.,* 952 F.2d 128, 137 n. 23 (5th Cir.), *cert. denied,* 506 U.S. 845 (1992)). See also *Albertson v. T.J. Stevenson & Co., Inc.,* 749 F.2d 223, 228 (5th Cir. 1984). When an affidavit merely supplements, rather than contradicts, prior deposition testimony, the court may consider the affidavit when evaluating genuine issues in a motion for summary judgment. *Infax,* 72 F.3d at 496 (citing *Clark v. Resistoflex Company,* 854 F.2d 762, 766 (5th Cir. 1988)). Plaintiff D.D.P. testified at his deposition on April 10, 1996 as follows:

Q. Okay. Now, did you ever tell anyone that he was touching you?

A. I tried to go down to the office and tell the people in Barbara Patrick's office.

Q. Did you go tell Barbara Patrick?

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[11]As the Second Circuit recognized in *Perma Research and Development Company v. Singer Company,* 410 F.2d 572 (2d Cir. 1969):

> If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Id. at 578.

A, They said she was busy on the phone. I could see her through the crack of her door, though.

Q. Okay. So you didn't talk to Barbara Patrick?

A. I told the administrative people in the office behind the counter.

Q. Who did you tell?

A. The people that was there in the office.

Q. Do you know who they are, --

A. I can't recall.

Q. All right. You never actually had a conversation with Ms. Patrick about what McGrew did to you, did you?

A. No.

Q. Was she on the phone?

A. Yeah.

Oral Deposition of D.D.P., attached as Exhibit 12 to Defendant's Appendix at 49, 51; Oral Deposition of D.D.P., attached as Exhibit 43 to Plaintiffs' Appendix at 436, 441.

The testimony in D.D.P.'s 1999 affidavit, however, is as follows:

> I no longer have a sufficient recollection to enable me to testify fully and accurately about what Mr. McGrew did to me and my report to Patrick and Mr. Beckham.... I remember that lawyers for the Dallas Independent School District and the Boy Scouts of America took my deposition in this case at my

> lawyers' conference room in 1996. When I gave my deposition, these lawyers asked me about what Mr. McGrew did to me and who I reported it to. On some of the questions in my deposition I said I did not recall. Still, I answered most of their questions because I felt I had to do [the] best I could, but I did not have enough memory of what really happened to allow me to testify fully and accurately about what Mr. McGrew did or my report of what he did. I have now reviewed my deposition of April 12, 1996. What I was doing there was trying to remember what I remembered. I was not really seeing the events in my mind as they happened. I was saying [what] I thought might have occurred. It was like describing a movie I saw a long, long time ago when I was very young and that had made a big impression on me, but that I no longer remembered. . . . I have now looked at my 1988 affidavit and my deposition. *What I said in my 1988 affidavit was said when I had knowledge and could be and was accurate. What I said on my deposition in 1996 was not.* I was trying to be truthful on my deposition, but I was not able to actually recollect what had happened that I described in my 1988 affidavit when I was questioned in 1996.

Affidavit of D.D.P. (emphasis added), attached as Exhibit 51 to Plaintiffs' Appendix at 475.

Plaintiff D.D.P. stated in a 1988 affidavit that McGrew had fondled him. In the affidavit he claimed that he told Ms. Patrick about what happened. In his 1996 deposition testimony, however, he clarified his report of the incident, stating that he actually told two women who

worked in Patrick's office.[12] See *Doe,* 153 F.3d at 218 n.7. While he stated that he thought Patrick probably could hear what he was saying,[13] he admitted that she was in another room on the telephone and that he could only see her through a partially open door. As the above deposition excerpt makes clear, D.D.P. denied ever having spoken to Patrick herself.

The plaintiffs now contend that it is D.D.P.'s 1988 affidavit, rather than his deposition in April of 1996, that is in fact accurate. Response at 20. If D.D.P. is being truthful in 1999, however, when he states that "I no longer have a sufficient recollection to enable me to testify fully and accurately about what Mr. McGrew did to me and my report to Patrick and Mr. Beckham," then his 1999 affidavit asserting that his 1988 affidavit "could be or was accurate" while his 1996 deposition

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[12] Even if it is assumed *arguendo* that D.D.P. did communicate the incident to two women in the Patrick's office, the office staff clearly did not have any authority over McGrew, nor any authority to take the requisite remedial action, so that any alleged notice to them did not constitute notice to DISD. Plaintiffs have failed to present evidence that any information given about the alleged incident to the office staff was ever communicated to Patrick or any other DISD official.

[13] In *Doe,* the Fifth Circuit observed that:

> As D.D.P.'s statement that he was "pretty sure [Patrick] could have heard" him telling the women in the office about the incident is entirely speculative, it is not sufficient to raise a question of fact as to whether Patrick was aware of the incident.

153 F.3d at 218 n. 7.

"was not" accurate amounts to little more than wishful thinking.

Conclusory allegations, such as the plaintiffs' argument that D.D.P. could have given Patrick notice, are not sufficient to establish a genuine issue as to whether DISD had actual knowledge of McGrew's sexual harassment of students. It is well established that testimony based on conjecture or speculation is insufficient to raise an issue of fact to defeat a summary judgment motion. *Ruiz v. Whirlpool, Inc.*, 12 F.3d 510, 513 (5th Cir. 1994). See also *Simmons v. Lyons*, 746 F.2d 265, 269 (5th Cir. 1984) (plaintiff's unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment.). Furthermore, such evidence does not allow a jury to make a rational, non-speculative finding that the DISD had actual notice of McGrew's sexual abuse of students. See, e.g., *Ruiz,* 12 F.3d at 514; *Transco Leasing Corporation v. United States*, 896 F.2d 1435, 1448-49 (5th Cir. 1990).

In submitting his second affidavit, D.D.P. is attempting to create a fact issue as to when Patrick had actual notice of McGrew's sexual harassment of students. D. D. P.'s second affidavit does not supplement his prior deposition testimony. If D.D.P.'s affidavit merely supplemented the deposition, it would have simply clarified or amplified the facts by giving greater detail or additional facts not previously provided in the deposition. Here, however, D.D.P. tells the same story differently. *Infax,* 72 F.3d at 496; see also *Thurman,* 952 F.2d at 136 n.23. It is apparent that D.D.P.'s second affidavit states facts which directly contradict the testimony he gave at his deposition.

Notice to the Office Staff, Beckham, and Emanuel

To hold a school district liable under Title IX for teacher-student sexual harassment, a plaintiff must show that an employee who has been invested by the school board with the supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so. *Rosa H.*, 106 F.3d at 650. Thus, plaintiffs must prove that the DISD had actual notice of the sexual harassment.

The plaintiffs argue that Patrick was aware of McGrew's actions. In support of their claim, they offer the deposition testimony of several children that McGrew molested, but the majority of the victims testified that they either told no one about the abuse or that they only told a teacher, a teacher's aide,[14] or a parent. Furthermore, the plaintiffs offer no evidence linking the information to Patrick. Therefore, as the Court of Appeals has already concluded, *Doe,* 153 F.3d at 218, these depositions do not support the claim that Patrick was aware of the abuse.

The remaining plaintiffs have conceded in both depositions and admissions that they did not give notice to any official of the school district with respect to the alleged conduct of McGrew. See Plaintiffs' Responses to Dallas Independent School District's Request for Ad-

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[14] D.D.P. also claims to have told Beckham about McGrew. Beckham was a teacher's assistant who, the record reflects, lacked the requisite authority to institute corrective measures on the district's behalf. Furthermore, there is no evidence that anything told to Beckham was ever communicated to either Patrick or any other DISD official.

mission, attached as Exhibit I to Defendant's Appendix at 4-12; Plaintiffs' Responses to Defendant Barbara Patrick's Request for Admission, attached as Exhibit 2 to Defendant's Appendix at 18-25.

Plaintiff W.J.H. testified that during the 1983-84 school year, Rhoads Elementary School teacher Doris Emmanuel ("Emmanuel") and Patrick asked him if McGrew had touched or fondled the plaintiff in any way. Plaintiff W.J.H. responded negatively to both inquiries. *See* Oral Deposition of W.J.H., attached as Exhibit 41 to Plaintiffs' Appendix at 422; Oral Deposition of W.J.H., attached as Exhibit 6 to Defendant's Appendix at 34. Thus, assuming for the purposes of this motion that Patrick did ask W.J.H. about any sexual abuse by McGrew, this court concludes -- as did the Court of Appeals in *Doe*, 153 F.3d at 218 n. 7 -- that W.J.H.'s denial of any such incidents was not sufficient to put Patrick on notice of the abuse.

J.H.'s Allegation

In the spring, of 1986,[15] a complaint was brought to Patrick's attention by Sandra Thomas, the mother of

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[15] There is some ambiguity in the record as to whether J.H.'s complaint was made in the spring of 1986 or 1987. Patrick initially thought *it* was in the spring of 1986. Testimony of Barbara Patrick from transcript of proceedings in *State of Texas v. John McGrew*, No. F-87-90504-IR in the 265th District Court of Dallas County, Texas, attached as Exhibit 34 to Plaintiffs' Appendix at 277. Later, during the pretrial discovery in this case, she remembered receiving the complaint in the spring of 1987. Oral Deposition of Barbara Patrick at 127, attached as Exhibit 39 to Plaintiffs' Appendix at 391. Construing this ambiguity in favor of the plaintiffs as the opponents of the motion for summary judgment, *see* pp. 6-7 above, the court will assume that the applicable date is the spring of 1986.

J.H. (a non-party victim) that McGrew had engaged in inappropriate physical contact with her son at school. J.H. told his mother and Patrick that McGrew fondled him when he delivered a note to McGrew's classroom. As Patrick does not dispute this incident, the court concludes that Patrick had notice as of spring 1986 of an allegation of sexual abuse by McGrew. *See* Oral Deposition of Barbara Patrick, attached as Exhibit 39 to Plaintiffs' Appendix at 391-92.

The parties agree that upon receiving J.H.'s complaint, Patrick spoke with the child, after which she confirmed that his teacher had indeed sent him with a note to McGrew's class, and then a meeting was held with Patrick, the mother, and McGrew.

The record reflects that Patrick investigated the matter, found no corroboration, and gave McGrew a warning. *See* Affidavit of John E. McGrew, attached as Exhibit I to Plaintiffs' Appendix at 3 ("[s]he told me the school does not put up with the kind of behavior I had been accused of and that if it really did take place, I would be dealt with"), There is no evidence that she acted with deliberate indifference. To the contrary, Patrick investigated the only allegation brought to her attention. As the *Doe* court held:

> The fact that Patrick misread the situation and made a tragic error in judgment does not create a genuine issue of material fact as to whether she acted with deliberate indifference toward J.H.'s constitutional rights.

153 F.3d at 219.

The Shifting Burden

When a motion for summary judgment identifies an absence of evidence to support, a material fact on which the non-movant bears the burden of proof at trial, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *Ruiz*. 12 F.3d at 513 (citing *Hibernia National Bank v. Carner*, 997 F.2d 94, 98 (5th Cir. 1993)).

The DISD's showing on this motion is sufficient to impose on the plaintiffs the burden of coming forward with specific facts showing that Patrick, or any other official of the school district who at a minimum had authority to institute corrective measures on the district's behalf, had actual notice of, and was deliberately indifferent to, McGrew's misconduct.

The plaintiffs have failed to create a genuine issue of fact as to (1) whether Patrick was aware of other allegations of abuse prior to the Spring of 1986 when Patrick was notified of J.H.'s complaint and (2) whether she acted with deliberate indifference once she was made aware of such allegations.

III. CONCLUSION

The Court of Appeals laid out the following roadmap for these proceedings on remand:

> In remanding this case for further proceedings, we in no way intend to sugget that summary judgment would be inappropriate if Defendants are able to demonstrate, as they did with respect to Plaintiffs' § 1983 claims, that no genuine issue of material fact exists with respect to Plaintiffs' Title IX claim. Indeed, given the factual development that took

> place in this case with respect to the § 1983 claims against DISD and Patrick, we can say that if Plaintiffs can produce no additional evidence, Defendants will be entitled to summary judgment on the Title IX claim.

Doe, 153 F.3d at 220 n. 8.

Thus, that court made it clear that the plaintiffs would have to present new evidence to avoid summary judgment on their Title IX claims. The plaintiffs, however, have failed to meet this burden. There is no evidence that prior to the spring of 1986, Patrick or any other official of the DISD (who at a minimum had authority to institute corrective measures on the district's behalf) had actual knowledge of McGrew's sexual abuse of students. Furthermore, there is no evidence that Patrick or the DISD was deliberately indifferent to the allegations of McGrew's misconduct once she or it had actual notice of such allegations.

As the *Gebser* court succinctly stated:

> The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience. No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system. The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a dis-

> criminatory, manner. . . . Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference.

118 S.Ct at 2000.

The plaintiffs have failed to demonstrate actual notice and deliberate indifference on the part of the DISD. The DISD's motion is therefore GRANTED.

SO ORDERED.

April 20, 1999.

/s/ A Joe Fish
A. JOE FISH
United States District Judge

(2)

No. 00-645

Supreme Court, U.S.
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NOV 17 2000
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In The

Supreme Court of the United States

JOHN DOE, ET AL.,

Petitioners,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should summary judgment in a Title IX suit brought against a school district for employee-to-student sexual harassment be governed by this Court's Title IX standards set forth in the 1998 decision in *Gebser v. Lago Vista Indep. Sch. Dist.*?

2. Can a party defeat a motion for summary judgment by manufacturing a factual dispute by introducing an affidavit contradicting his own deposition testimony?

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STATEMENT OF THE CASE

B. Factual Background

From 1983 to 1987, John McGrew, a third-grade teacher and Boy Scout troop leader at Joseph J. Rhoads Elementary School, sexually molested some of his male students.[1] McGrew was subsequently convicted in state court of one count of aggravated sexual assault and two counts of indecency with a child. Barbara Patrick was the principal of the school during the same time period.[2]

The court of appeals correctly found that Ms. Patrick was informed once (by student J.H.[3]) of an allegation of inappropriate sexual contact by McGrew. In that incident, Ms. Patrick arranged a meeting between the parent (Sandra Thomas), herself, and McGrew. "At some point,

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[1] Joseph J. Rhoads is an elementary school that is part of the Dallas Independent School District (hereinafter also referred to as the "DISD").

[2] As principal, Ms. Patrick was the instructional leader of her school and responsible for student discipline. Ms. Patrick had the authority to make *recommendations* regarding dismissal of employees assigned to her school. The court of appeals specifically stated it "assume[d] without deciding that Patrick was an official with the power to remedy discrimination on behalf of DISD for purposes of determining whether Patrick had actual notice of discrimination and acted with deliberate indifference." *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000) (hereinafter referred to as *Doe II*). Thus, the issue of whether or not Ms. Patrick's knowledge could create liability for the DISD has never been resolved, since the trial and appeals court both found no deliberate indifference and ended their analysis there.

[3] The student's initials are used to protect the identity of the child.

Patrick also asked J.H. to repeat his accusation to McGrew. During that meeting, Patrick and Thomas both asked McGrew directly if he had fondled J.H., and he denied it." *Doe II* at 387. Ms. Patrick informed Ms. Thomas that she would make sure J.H. was not sent back to McGrew's classroom. *Id.* at 388.

The trial court and court of appeals found that following the meeting with the parent:

> Patrick told McGrew that the accusation was very serious, and led him to understand that he should not repeat the behavior that made the child accuse him of abuse. McGrew remembers this warning somewhat differently: 'She told me the school does not put up with the kind of behavior I had been accused of and that if it really did take place, I would be dealt with.' Patrick also spoke to J.H.'s teacher, who confirmed she had sent him to McGrew's classroom with a note, and who stated that J.H. had not mentioned any misconduct by McGrew to her when he returned to her classroom.

Doe II at 388.

The following are examples of statements by petitioners in their petition that are not supported by evidence in the record. "Barbara Patrick . . . was invested by the school board with . . . the power to take actions that would end sexual abuse." Petition at 3. (There is no evidence in the record that the school board invested Ms. Patrick with any such authority). Petitioners repeatedly refer to two children (J.H. and D.D.P.) who told Ms. Patrick they had been fondled, when only one child (J.H.)

made such an allegation. *Doe II* at 387. Petitioners' version of Ms. Patrick's meeting with J.H., his mother, and later McGrew is not supported by any evidence in the record, and is contrary to the findings of both courts. *See infra.*[4]

Petitioners' claim that D.D.P. was "not allowed to refresh his recollection" is again outside of the record. *See infra.* In 1988, D.D.P. produced an affidavit for the police claiming McGrew fondled him four years earlier, which in part claimed he "went down to the office and told Ms. Patrick . . . about what happened." When asked in deposition to explain what that meant, D.D.P. explained that:

> [H]e told administrative staff in Patrick's office of McGrew's act, but that Patrick was actually in her office, talking on the phone, at the time. When asked 'You never actually had a conversation with Ms. Patrick about what Mr. McGrew did to you, did you?' D.D.P. answered, 'No.'

Doe II at 386-387. The trial court thereafter granted summary judgment on petitioners' § 1983 claims, and the court of appeals affirmed. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211 (5th Cir. 1998) ("*Doe I*"). In remanding the Title IX claim, the court of appeals held:

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[4] Ms. Patrick never discouraged or pressured the mother, and never made it difficult to arrange a conference. *Doe II*, at 387-388. The record indicates Ms. Patrick called the boy's mother, met with the mother and the boy, then had McGrew join them, at which time the boy confronted McGrew with Ms. Patrick and his mother present. *Id.* Ms. Patrick never stated she "knew he had not done what he was accused of." Petition at 4. There is absolutely no evidence McGrew and the student were asked to meet "one on one." *Id.*

> In remanding this case for further proceedings, we in no way intend to suggest that summary judgment would be inappropriate if Defendants are able to demonstrate, as they did with respect to Plaintiffs' § 1983 claims, that no genuine issue of material fact exists with respect to Plaintiffs' Title IX claim. Indeed, given the factual development that took place in this case with respect to the § 1983 claims against DISD and Patrick, we can say that if Plaintiffs can produce no additional evidence, Defendants will be entitled to summary judgment on the Title IX claim.

Doe I, 153 F.3d at 220 n. 8, cited in *Doe II* at 382.[5] Upon the filing of respondent's motion for summary judgment on the remaining Title IX claim, petitioners created D.D.P.'s 1999 affidavit, claiming his deposition testimony (already considered by the trial court and the court of appeals for § 1983 purposes) was incorrect.[6] The trial court determined that this subsequent and contradictory affidavit was not sufficient to create a genuine issue of material fact, and granted summary judgment, which was affirmed by the court of appeals.

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[5] The case was remanded due to this Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

[6] Petitioners claimed D.D.P.'s 1988 affidavit was correct, not his deposition testimony. However, even if one were to look only at the 1988 affidavit, *arguendo*, it does not create a genuine issue of material fact, in that it never states specifically what he allegedly told Ms. Patrick, and his 1999 affidavit says he cannot now remember the events underlying his claims.

REASONS FOR DENYING THE WRIT

This Petition for Writ of Certiorari should be denied in all respects. There is no new or novel issue for this Court to consider. Nor does this case involve issues representing a split among our federal circuits. The Fifth Circuit's opinion is consistent with this Court's rulings on summary judgment standards as outlined in *Reeves v. Sanderson Plumbing Prod., Inc.*, ___ U.S. ___, 120 S.Ct. 2097 (2000) and *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242 (1986). Moreover, the Fifth Circuit applied the proper standards for Title IX claims – those articulated by this Court in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). Indeed, conspicuously absent from petitioners' application is any reference to *Gebser*, which controls this Title IX case. Petitioners erroneously claim that the court of appeals' decision conflicts with the 8th Amendment decision in *Farmer v. Brennan*, 511 U.S. 825 (1984) and request this Court review a case factually similar to *Gebser*, and then to apply different standards under *Farmer*. This Court's prior decisions have thoroughly addressed summary judgment and Title IX standards and the lower courts had no problem applying those guidelines to this case. This case presents no new issues or statutory interpretations distinct from what this Court has decided in its prior decisions.

A. *Reeves v. Sanderson Plumbing Prods., Inc.*

Petitioners argue that the court of appeals considered the credibility of evidence in granting DISD's motion for

summary judgment, thus violating this Court's *Reeves*[7] standards for summary judgment motions brought pursuant to Federal Rule of Civil Procedure 56. Petitioners argue that it was erroneous for the lower courts to pursue "any sort of evidentiary analysis" of a witness' testimony when considering the Rule 56 motion. Petition at 8. While it is true that courts cannot resolve factual issues on summary judgment, courts do correctly engage in some analysis of the evidence. Federal Rule of Civil Procedure 56 empowers a court to make a threshold determination of whether a factual issue is "genuine." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The court is not acting as a fact-finder when it makes such determinations, as this is a question of law.[8]

Not every alleged factual conflict creates a "genuine" issue of material fact. As this Court points out, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.* at 249 (citations omitted). The court of appeals had the benefit of *Reeves* when it issued its decision in this case and remained

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[7] Respondent acknowledges this Court's treatment of Rule 50 and 56 issues using the same standards, but the fact cannot be lost that *Reeves* involved an appeal from a Rule 50 motion for judgment after a trial on the merits in which a jury ruled against an employer in an age discrimination case brought pursuant to 29 U.S.C. § 621, *et seq*.

[8] *Reeves* cites *Anderson v. Liberty Lobby, Inc.* throughout its entire analysis, and in no way changes or modifies the analysis mandated by *Anderson* for purposes of a court's initial appraisal in these determinations. *Reeves*, ___ U.S. ___, 120 S.Ct. at 2110.

consistent with this Court's opinions on summary judgment standards when it determined that there was no genuine issue for trial.[9]

The court of appeals reviewed the evidence and the inferences from it in the light most favorable to the petitioners. *Anderson v. Liberty Lobby, Inc.* at 255. In doing so, the appellate court was guided by this Court's *Gebser* Title IX standards. *Cf. Anderson v. Liberty Lobby, Inc.* at 255 (The determination of whether a given factual dispute requires submission to jury must be guided by the substantive evidentiary standards that apply to the case.).

(1) J.H.'s Claims

Petitioners' claim the Fifth Circuit somehow failed to follow *Reeves* when analyzing Ms. Patrick's actions involving her investigation of J.H.'s claims. To the contrary, the court of appeals applied the substantive evidentiary standards for a Title IX case to the uncontroverted and unimpeached summary judgment evidence. To survive summary judgment, petitioners had to offer substantial "genuine" evidence that Ms. Patrick (1) was an official who at a minimum had authority to address the alleged discrimination and institute corrective measures, (2) had actual notice of discrimination, and (3) acted with deliberate indifference. *See Gebser* at 292.

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[9] *Reeves* was issued on June 12, 2000, while *Doe II* was issued July 24, 2000. In fact, the Fifth Circuit acknowledged *Reeves* in a case issued before *Doe II*. *See Vadie v. Miss. State Univ.*, 218 F.3d 365 (5th Cir. 2000) (issued July 5, 2000, 19 days before *Doe II*).

Reviewing all the evidence in the record in the light most favorable to petitioners, the appellate court assumed that Patrick was an official who had authority to address the alleged discrimination and had actual notice of discrimination against J.H. in 1984. *See Doe II* at 384. But petitioners could offer no evidence upon which a reasonable juror could say that Ms. Patrick acted with deliberate indifference as a matter of law.

Looking at the evidence in the light most unfavorable to DISD and most favorable to petitioners, the evidence is uncontroverted that: Ms. Patrick met with all involved, gave J.H. and the parent the opportunity to confront McGrew, and asked McGrew point blank whether the accusation was true. *Doe II* at 387. Ms. Patrick then gave McGrew a verbal warning, and followed up by speaking with the other teacher involved to try to verify J.H.'s claims. *Doe II* at 388. Nothing in the record indicates McGrew ever made sexually inappropriate contact with J.H. again.

Gebser makes it clear there must be an official decision not to remedy the violation to constitute "deliberate indifference." *Gebser* at 290. One must remember that Ms. Patrick's investigation of J.H.'s complaint took place in 1986, over ten years before she and the DISD had the benefit of *Gebser*, and long prior to this Court's decisions in *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992), *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and the Fifth Circuit's decision on teacher to student sexual harassment, *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456 n. 12 (5th Cir.) (*en banc*), *cert. denied sub nom., Lankford v. Doe*, 513 U.S. 815 (1994). In spite of the ten years difference, DISD and Ms. Patrick investigated and

gave a warning, meeting the 1998 standards set forth by this Court in *Gebser*.

Petitioners have only their self-serving allegations to offer as evidence that Ms. Patrick was deliberately indifferent, which is not sufficient to withstand summary judgment. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (Plaintiff cannot rest on mere allegations but must set forth by affidavit or other evidence specific facts.) There is no evidence in the record to support a showing of deliberate indifference. In deciding that Ms. Patrick was not deliberately indifferent, the court of appeals was not acting as a fact-finder but rather was applying, as a matter of law, the uncontroverted and unimpeached evidence in this case to the legal standards for summary judgment in a Title IX case.

(2) D.D.P.'s Affidavit(s)

Petitioners allege a second student, D.D.P., informed Ms. Patrick of inappropriate conduct by McGrew. Petitioners proffered an affidavit (by D.D.P.) in 1988 saying that in 1984 McGrew had touched his genitals and that he "went down to the office and told Ms. Patrick . . . about what happened." *Doe II*, at 385. However, in 1996, after this lawsuit was filed, D.D.P. clarified what happened when he went "down to the office":

> In his deposition, D.D.P. stated that McGrew had touched his genitals . . . [and] that he told the administrative staff in Patrick's office of McGrew's act, but that Patrick was actually in her office, talking on the phone, at the time. When asked 'You never actually had a conversation with Ms. Patrick about what Mr. McGrew

> did to you, did you?' D.D.P. answered, 'No.' D.D.P. also stated that he never put his accusation in writing.

Id. In 1999, petitioners attached to their response to DISD's motion for summary judgment an affidavit by D.D.P. that in 1996 he "did not have enough memory of what really happened to allow [him] to testify fully and accurately. . . . " *Id.* During his 1996 deposition, D.D.P. was represented by counsel and responded to multiple questions by stating he could not answer them because he did not recall what had happened. The court of appeals found:

> [I]n his 1996 deposition, D.D.P. responded to certain questions by stating that he could not answer because he did not recall what had happened. Thus, he knew that if he did not remember whether a particular event occurred or the details of how that event had occurred, he could say 'I do not recall' in response to a question regarding that event during his deposition. However, he failed to do so when asked whether he directly told Patrick about the abuse.

Doe II at 386-387. When asked about what he directly told Ms. Patrick, he unequivocally testified that he had not had a direct conversation with her. *Doe II* at 386.

Petitioners also claim the court of appeals "disregarded" the 1999 affidavit. Petition at 7. This is simply inaccurate. The court of appeals spent a page and a half analyzing, not disregarding, the sufficiency of the 1999 D.D.P. affidavit to determine whether it created a "genuine" issue of material fact. *See Doe II* at 385-386.

The only minor issue for this Court to consider is whether a party can manufacture a genuine dispute of fact merely to defeat a motion for summary judgment by introducing an affidavit conflicting his own deposition testimony. Although this Court has never directly ruled on this issue,[10] the circuits remain constant in having rejected similar attacks on summary judgment motions. *See S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 137 n. 23 (5th Cir.), *cert. denied*, 506 U.S. 845 (1992); *Perma Research and Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2nd Cir. 1969); *Camfield Tires, Inc. v. Michelin Tires Corp.*, 719 F.2d 1361, 1365-66 (8th Cir. 1983); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). *See also generally* 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2726 (3rd ed. 1998).[11] While not wishing to seem

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[10] This Court mentions sham affidavits in describing the background of a case in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 367 (1966).

[11] The Fifth Circuit recognizes that there are cases where a nonmovant may offer a sufficient explanation in support of its later-made affidavit to create a credibility or other fact issue. *See S.W.S. Erectors*, 72 F.3d at 495-96. However, this is not a case where petitioners' subsequent affidavit merely supplemented or clarified his earlier deposition testimony because D.D.P.'s subsequent affidavit was drafted for the sole purpose of contradicting his sworn deposition testimony in an effort to avoid summary judgment. Nor is this a case where D.D.P. was outwitted or confused by opposing counsel in his deposition and sought to clarify his testimony by later affidavit. Counsel's questions were straightforward and D.D.P. never claimed to have misunderstood the questions asked of him. *Doe II* at 386-387.

presumptuous, respondent would submit that this consistency by the lower appellate courts is why this Court has never seen fit to write on the subject. *Cf. Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 802 (1999) (This Court opted to let the law on this issue remain as it is).

This approach is consistent with this Court's opinion in *Anderson v. Liberty Lobby* which states that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson* at 247-248.

Petitioners' proposition is that any party can avoid summary judgment by simply submitting an affidavit in response to summary judgment evidence directly contradicting his own deposition testimony, thereby creating a fact question. If that were the case, there would be few, if any, summary judgments. *See, e.g., Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 619 (2nd Cir. 1996)["If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." (citations omitted)]. According to petitioners, they can take an oath and be deposed, then take an oath and directly deny and contradict themselves in a post-deposition affidavit, avoid summary judgment and simply place themselves before a jury to decide which story is more credible. That is an affront to the summary judgment process and a mockery of the discovery procedures.

In the end, the court of appeals correctly and tactfully found that the 1999 affidavit was an attempt by a nonmoving party to manufacture a dispute merely to defeat a motion for summary judgment (i.e., there was no *genuine* issue for trial). Both the trial and intermediate courts considered all the evidence in the record, including D.D.P.'s previous testimony in his deposition, and concluded there was no *genuine* issue of material fact. Petitioners' claim that analyzing D.D.P.'s attempt to manufacture a dispute merely to defeat a motion for summary judgment was "judicial activism." Petition at 8. To the contrary, it was *stare decisis*, applying previous standards as set forth by this Court to the facts at hand – and proper in all respects.

(3) Rule 803(5)

The Petition requests this Court broaden FED.R.EVID. 803(5) and make it a King's X against summary judgment. Specifically, petitioners claim that Rule 803(5) should permit parties who admit matters during deposition and later claim they no longer remember material facts to withdraw their admissions and testimony through an affidavit after the deposition. According to the Petition, Rule 803(5) should bar summary judgment motions and make everything a jury question. That would mean the use of depositions for summary judgment will be wholly thwarted, and every case will have to go to a jury.[12]

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[12] Ironically, petitioners argue the 1988 affidavit was "fresh" in D.D.P.'s mind, even though it was written by the police four years after the incident took place. *Doe II*, at 385. D.D.P.'s affidavit, however, was not introduced until *after* the

The court of appeals was flawless in its analysis of Rule 803(5), and petitioners' attempt to use it to negate D.D.P.'s entire deposition. That is not the purpose of Rule 803(5), and both courts saw through this argument. Rule 803(5) is used to refresh recollection when a party cannot remember something, not to materially change sworn testimony once a party realizes the admission could lead (and did here) to summary judgment.

B. *Farmer v. Brennan*

Petitioners claim "[d]espite its relevance, the Fifth Circuit opinion completely disregards *Farmer*." Petition at 10. To the contrary, the court of appeals' opinion cited *Farmer* twice in its opinion. While the court of appeals' opinion is in no way inconsistent with the *Farmer* decision, petitioners ask this Court to analyze apples and oranges – *Farmer* analyzed the 8th Amendment, while this case involves Title IX.

Farmer involved the liability of prison officials and cruel and unusual punishment, and the requirements to protect those in a "special relationship." When analyzing 42 U.S.C. § 1983, this Court has repeatedly recognized

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court of appeals ruled petitioners did not show deliberate indifference in its § 1983 cause of action, when they stated, "if Plaintiffs can produce no additional evidence, Defendants will be entitled to summary judgment on the Title IX claim." *Doe I*, 153 F.3d at 220 n. 8, cited in *Doe II* at 382. Upon notice that they needed "new evidence," petitioners created D.D.P.'s 1999 affidavit contradicting his deposition testimony in the record.

schools as having different standards than prisons.[13] *See New Jersey v. T.L.O.*, 469 U.S. 325, 338-339 (1985) ("We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment."); *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) ("The prisoner and the schoolchild stand in wholly different circumstances. . . . ").[14] The Fifth Circuit even cited *Farmer* in *Johnson v. Dallas Indep. Sch. Dist.*, holding that the special relationship of a student to a school is not analogous to a prison:

> There can be no liability of state actors . . . unless the fourteenth amendment were to make schools virtual guarantors of student safety – a rule never yet adopted even for those in society, such as prisoners or the mentally ill or handicapped, who are the beneficiaries of a 'special relationship' with the state.

Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 203 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995), citing *Farmer v. Brennan* as an example.[15]

This is not a § 1983 case. Petitioners have petitioned this Court only under Title IX, and the proper analysis is

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[13] This Court in *Gebser* found the standards of deliberate indifference in Title IX to be comparable to the standards under § 1983. *Gebser* at 291.

[14] In *Ingraham*, this Court found corporal punishment by schools does not reach the level of a violation of the 8th Amendment.

[15] This Court in *Farmer* recognized the unique situation posed by prisoners, in that the government has "stripped them of virtually every means of self-protection and foreclosed their access to outside aid." *Farmer*, 511 U.S. at 833.

found in *Gebser v. Lago Vista Indep. Sch. Dist.* Liability will lie only if there is actual notice to an official with authority to stop the discrimination **and** deliberate indifference. *Gebser* at 292. The lower courts correctly applied the definition of deliberate indifference in finding Barbara Patrick was not deliberately indifferent under the circumstances. The court of appeals found:

> Patrick interviewed J.H., spoke with his mother, spoke with J.H.'s teacher, spoke with McGrew and warned him either that he would be "dealt with" if the accusations were founded or that he should avoid acting in a way that could be misconstrued.

Doe II at 388. Even *Farmer* found that deliberate indifference "entails something more than mere negligence . . . something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer* at 835. Because Ms. Patrick responded reasonably to the risk of harm, the DISD avoids liability, "even if the harm ultimately was not averted." *Id.* at 844.

CONCLUSION

Petitioners' petition sets forth no new or unique issues of law, but rather seeks to have this Court reconsider its 1998 decision in *Gebser*. Respondent urges this Court to deny this petition in all respects, and grant respondent all relief it deems appropriate, both in equity and in law.

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